S. HRG. 103-14

ETHICS PROCESS: TESTIMONY OF HON. LOUIS STOKES, HON. JAMES HANSEN, AND A PANEL OF ACADEMIC EXPERTS

HEARING

BEFORE THE

JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

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FEBRUARY 25, 1993

Printed for the use of the Joint Committee on the Organization of Congress

U.S. GOVERNMENT PRINTING OFFICE

65-585

WASHINGTON : 1993

For sale by the U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328
ISBN 0-16-040616-1

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[Authorized by H. Con. Res. 192, 102d Congress]

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CONTENTS

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ETHICS PROCESS: TESTIMONY OF HON. LOUIS STOKES, HON. JAMES HANSEN, AND A PANEL OF ACADEMIC EXPERTS

THURSDAY, FEBRUARY 25, 1993

UNITED STATES CONGRESS,
JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS,
Washington, DC.

The committee met, pursuant to notice, in room SC–5, The Capitol, Hon. Lee H. Hamilton (co-chairman of the committee) presiding.

OPENING STATEMENT OF HON. LEE H. HAMILTON, A U.S. REPRESENTATIVE FROM THE STATE OF INDIANA

Chairman HAMILTON. The meeting of the Joint Committee on the Organization of Congress will convene.

This morning we take up again the question of ethics reform. One of our key goals, of course, is to look at the public image of this institution. All of us want to try to help improve the public confidence in the Congress by streamlining our procedures and rationalizing our processes and taking many other steps.

But no other part of our agenda is more crucial to public confidence in the Congress than the way in which the House and the Senate consider cases of alleged misconduct by sitting members. Most of us believe that the vast majority of members of the Congress are honest and hard working persons, yet the misconduct of some can discredit the institution as a whole and reduce its ability to function.

Today we have two distinguished panels of witnesses about how the process by which the House and Senate handle ethics cases might be improved. The first panel includes two former leaders of the House Ethics Committee, Congressman Louis Stokes, and James Hansen. The House of Representatives and the Congress owe each of these gentlemen a large debt of gratitude for their extraordinary years of service and leadership on the Ethics Committee. We are most appreciative that they will take time this morning to share with us their views about how the Congress handles ethics problems.

Following them we will have a panel of very distinguished scholars with expertise relevant to legislative ethics procedures. I will introduce that panel at a later time, and ask my colleagues here to proceed with their testimony. Let me say to you that we're very, very pleased indeed to have you. I think you recognize that the Republicans have a conference this weekend, and so our attendance is

less than it might ordinarily be. But all the more reason that we appreciate your being here this morning and you may proceed with your testimony.

Congressman Stokes, and then Congressman Hansen.

STATEMENT OF HON. LOUIS STOKES, A U.S. REPRESENTATIVE FROM THE STATE OF OHIO

Mr. STOKES. Thank you very much, Mr. Chairman, and let me say how much I appreciate the opportunity to appear here before this Joint Committee and to give testimony on this very important subject.

I'm also pleased to be joined here by Jim Hansen. Jim has given the House extraordinary service in terms of serving on the Ethics Committee of the House. He has actually served 12 years on that committee, and as you and I both know, this is an assignment that no member of the House seeks. It is a service that we render out of the love and respect that we have for the institution and for our colleagues with whom we serve.

And while I have served two times, once for a period of 4 years as chairman of the committee and another period for 2 years, Jim's service has been over and beyond any service we have a right to expect of any member. It's an honor to be here with him this morning.

You have asked Jim and I to discuss the current enforcement procedures of the House Committee on Standards of Official Conduct, known as the Ethics Committee. As I previously mentioned, I served as chairman of the committee from 1981 to 1985, and again during the last Congress when Jim was the ranking Republican member. The current occupants of these positions, of course, are now Jim McDermott of Washington and Fred Grandy of Iowa.

I would also note that together, jointly, Jim Hansen and I together have served on the committee at various times for almost 20 years. And I prefer not to speculate, Mr. Chairman, about what that indicates about our ability to say no.

The current enforcement procedures have been in place since the beginning of the last Congress. They were recommended by the 10-member House Bipartisan Task Force on Ethics, appointed by the speaker and the minority leader in February, 1989. The task force, over 10-month period, undertook an extensive review of ethics rules and procedures. It conducted private interviews with over 30 members of Congress.

As I recall, Mr. Chairman, you were one of the members of Congress who testified before our task force at that time. In addition, over 24 members, academicians and journalists testified during four days of public hearing.

The principal areas addressed by the bipartisan task force, which was co-chaired by Representatives Vic Fazio and Lynn Martin, were: One, acceptance of gifts; two, honoraria and outside earned income; three, financial disclosure; four, use of official resources; five, ethics committee procedures. I was a member of the task force, one of two members assigned to the subgroup on ethics committee procedures.

In the report which we issued, we stated the fact that the task force was charged with reviewing all rules, regulations and statutes governing the official conduct of members of the House and recommended changes that will both enhance members' understanding and compliance with the rules and to increase public respect for the integrity of the institution.

We stated in that report of the task force recommendations a mount of the most far reaching Government-wide ethics legislation in over a decade. That was in 1989. At that time, Mr. Chairman, the primary criticism of the ethics committee was not that it dealt too leniently with members, but just the opposite, that its procedures were unfair.

Specifically, most of the task force testimony emphasized a lack of due process, inherent in a system where the same group charged with determining if there was sufficient cause to bring charges also decided if the charges were approved and then recommended the appropriate punishment. Essentially, we were acting as grand jury, petit jury, and the judge, they were all the same.

That criticism led to the bifurcated system in force today, which I want to now summarize. When a complaint is properly filed with the committee, the committee must then meet and decide by majority vote of its 14 members, equally divided, seven Democrats and seven Republicans, whether the complaint merits further inquiry.

If it does, then the chair and the ranking minority member appoint a four or six person investigative subcommittee equally divided between parties to undertake a preliminary inquiry to determine if there is reason to believe that a violation of the rules of the House or other applicable standard of conduct has occurred. The chair and ranking minority member cannot serve as voting members of the investigative subcommittee.

If the investigative subcommittee concludes there is reason to believe a violation has occurred, it issues a statement of alleged violation. The chair and ranking minority member then designate the remaining eight or ten members of the committee, as the case may be, to serve on the adjudicative subcommittee, which must then determine if the charges have been proved by clear and convincing evidence. If so proved, the full committee then reassembles to determine what sanction to recommend to the House.

I believe the system is sound. It goes a long way toward removing the bias thought to exist in the old system by retaining the internal enforcement mechanism. In addition, it lessens the time all members must spend on a case while ensuring that a sufficiently large number of members is involved in the decision making process.

Finally, coupled with an increase of committee membership from 12 to 14, which action was taken by the task force, along with a 6-year limit on service, it insures that the burden and the power of ethics committee service are shared among House members.

While, as I stated, this process seems to be sound, I must also point out that it has yet to be tried. That is, during the 102d Congress, very few complaints were filed with the committee and none necessitated use of the process which I have just described.

In any event, as far as the House is concerned, I am troubled by calls for further procedural reforms, which are based on the notion

that the Ethics Committee has not done its job or has not done it properly. Let me just make reference to the task force report on which the things that we did were these:

We expanded the committee from 12 to 14; we bifurcated the committee into an investigative and adjudicative function; we provided the right to counsel for members of the House who were charged and had to go to the floor; we provided them the right of counsel on the House floor; we set up a three-term statute of limitations.

We provided an office of advice and education and gave them specific responsibilities as to conducting seminars, an ongoing function of educating and keeping our members and their spouses informed as to all aspects of the Ethics Committee rules. We provided honoraria ban, and also the outside income limits. We set up the four-day limit on domestic travel, and the seven-day limit on foreign travel under the gift regulations under which we operate.

Also I think it's important to point out, Mr. Chairman, that during the six Congresses which preceded the advent of the current process, the committee considered 29 complaints against member of the House. As a result of these cases, one member was expelled from the House, four members were censured, three members were reprimanded, and two letters of reproval were issued by the committee. In addition, nine members, including a speaker, resigned from the House before the committee could complete action on their cases.

This enforcement record, then, was not in the main accompanied by adverse publicity. Nor does it indicate a House unable or unwilling to discipline its own members when necessary. Therefore I am not persuaded that calls for a radical restructuring of ethics enforcement procedures have any basis on the record. I am particularly troubled by a proposal to shift some of the Congress' constitutional enforcement responsibilities to outsiders, whether they be former members or former judges.

First of all, I believe that to the extent possible, charges of wrongdoing should be dealt with by the judicial process and also by the voters. Where particular conduct adversity affects the Congress or violates internal rules, then the ethics committees should act. The best judges of both, I think, are sitting members, both in terms of knowledge and in terms of accountability both to the institution and members who are involved and to the public.

The basic problem with these proposals is accountability. Why would an outside group not accountable to other members or to the voters do a better job of deciding hard cases or of convincing the public of the wisdom of their decisions?

Finally, Mr. Chairman, let me comment on two issues reviewed by the Bipartisan Task Force on Ethics. The task force considered proposals for an independent investigative office or special prosecutor for Congress. After 10 months of discussion on these matters and listening to others on it, we rejected them on the grounds that such mechanisms ignore the basic responsibility of the Congress under the Constitution to discipline its own members.

The task force also considered drawing on sitting members by lot from outside the Ethics Committee to either conduct investigations or decide whether charges have been proved. While these proposals

were ultimately rejected by the task force because of perceived practical problems, I do believe that there may be some merit in the latter, that is randomly selecting current members, not on the Ethics Committee, to decide whether charges preferred by the committee have been proven.

The difficulty I think you are going to find with a lottery process of that sort is the fact that such members are not generally familiar with the procedures of the committee, and you will find also inherent in that the problem that members just do not want to be called upon to give this kind of service.

If the current House procedures, which are new and which have not yet been tested are to be changed, and it is not clear that the foundation has been laid for doing so, I would then move in this direction. It further separates the grand jury from the petit jury, thus insuring more impartial deliberations, while responding to the perception that the Ethics Committees are designed solely to protect members. In addition, the enormous burdens on the time of the permanent Ethics Committee members would also be reduced.

Mr. Chairman, at this time I am pleased to yield to Mr. Hansen for such testimony as he desires to give.

[The statement of Mr. Stokes is printed in the Appendix.]

Chairman HAMILTON. Well, thank you very much, Mr. Stokes. Mr. Hansen.

STATEMENT OF HON. JAMES HANSEN, A U.S. REPRESENTATIVE FROM THE STATE OF UTAH

Mr. HANSEN. Thank you very much, Mr. Chairman, and I appreciate being here, and I recognize you and my friend Bill Emerson.

And I appreciate the comments made by Lou Stokes. I served with Lou twice on the committee, and he did an excellent job, he's a true gentleman. He rendered a great service to this House.

I really don't have a prepared statement, but I would like to talk a little bit about the committee and some of the things we have done over my 12 years and the 27 cases that we have looked at. I think, if there is a weakness to this bifurcation that we have come up with, and as Lou pointed out, we have really not tried it, but during the check cashing issue, we did have a subcommittee work on it.

If there is a weakness, and I don't know if it's terminal or not, probably what it would be would be the idea that frankly the 14 members of the committee know what's going on. I think we tried to follow what a grand jury would do, when they would be dismissed they would go on. It's a little difficult to do that.

If that's important or not, I don't know. But I do feel that if there is any Achilles heel to that, it would be the point that the members of the committee would know what was happening, and it wouldn't be a clean group that would then pick up the facts and go with it.

I really somewhat agree completely with Lou Stokes regarding whether or not we should bring in an outside body. I really don't know how they would do it. We've taken these cases, take for example one where the Speaker of the House resigned. We worked on that for literally months and months. And we would spend some-

times 15, 16, 17 hours going over testimony. We would be there during deposition. We got a pretty good idea of how it would work.

Eventually we have to go to the floor, and eventually we have to bring it up to other members and discuss with them what the outcome is going to be, and if they want to accept our recommendation or if they want to abandon our recommendation. You may recall in some cases other members came to the floor and said they did not want to accept the recommendation of the Ethics Committee.

I would hate to be in a position where I would have an outside group of whoever they may be and how talented they would be, that would come to the floor and say I will now pick up on this thing, we turn it over to them. Where do they get the background and the understanding? I think it's a tremendously difficult situation to send someone to the floor who hasn't had those months and months or the understanding, the study, the debate that goes on in the ethics committee.

Of the cases that we have gone over, I guess every one of them, I guess I could say there is one part or another part I don't feel entirely comfortable with, but generally speaking, I think we did a pretty good job. And generally speaking, and I can't speak for the Senate side, but on our side people felt pretty good about what we did. And they felt that we did a good job.

I'd like to make a point, Mr. Chairman, that we have never had, in my 12 years on that committee, we have never had a partisan vote. Now, we've come as close as one. But we have never had one where we didn't feel good about it.

Secondly, people feel, and I notice the press has made a big thing out of the idea, well, it's just these members, they'll sweep it under the rug. They didn't have to sit here and go through it. They didn't have to walk on the floor as a member of the Ethics Committee and have members who won't even talk to you for a while. One of the good things that we have done is this advisory committee, education and advisory.

It's not at all uncommon for members of the committee, in fact, it's a very common thing, almost a daily occasion, where a member will come up to you and he'll say, hey, Jim, I've got a problem, could I talk to you for a moment? We have the problem of saying yes, and sitting down and listening to them. That's a big mistake.

We have found in the past, we don't do that anymore, but we take them by the hand and walk them down to the committee and they get to talk to somebody like Mark Davis, who is a very talented young man. He takes their case and he goes through it in detail. If he can't give them a response then we ask for a written response, which we both will sign and send it out. And it's kind of like an attorney general's opinion. And they can use that to rely on.

To me, that's been one of the best things that we have come up with on the committee, is the education advisory. And that in effect has turned off a lot of problems that are sitting out there waiting to happen. If we can take them down to Mark or one of the other talented young individuals down there, they can go through it in somewhat detail and explain to them where they stand on something.

Unfortunately, the Ethics Committee has been looked in the past as somewhat of the Gestapo, stay away from that dungeon that they hear about. It's like the IRS, they are immediately going to start an investigation and I'm going to be in big, big trouble. That hasn't turned out to the be the case. In the last 2 or 3 years, it's turned out to be exactly opposite that. The Ethics Committee is really a group that is there to help and give advice and counsel and to keep those people from having big problems, and not getting them into trouble.

I personally think that was really the intent behind what happened in the last change in the Ethics in Government Act, and I think it has worked out very successfully. I really think, Mr. Chairman and members of the committee, that it would be a mistake, and again I say I don't know what goes on on the Senate side, but on our side and in my 12 years on that committee, I can't think of a case I don't think we handled correctly. I can't think of a case that if it didn't come out where the person was really probably in better shape because we went through it, and there is nothing more painful than an ethics investigation.

Any other thing, we can talk about it, how we're going to vote and let it go, but it doesn't affect the life and the career of that individual. And we have got the life and the career of somebody on hold, the tenseness he goes through, very candidly Mr. Chairman, I have had many members come to me with tears in their eyes saying, get this damned thing over with. I can't go on with this and the press and the problems with my family, my wife and others. Please conclude it.

I think it's very important that we continue the way that we are doing, that we get on a case, we handle it, we get it behind the individual and live with the results. I personally would be happy to debate with any member of the press who has said we have done a shabby job, any case they want to talk about. I don't think that's true, I think we have done a good job.

I think we have been able to take care of the problems that a member or members have had and do it in a way that has not been sweeping anything under the rug, as we have been accused of doing, which candidly, I resent that just a wee bit, as that has come out over the past 12 years I have been on the committee.

I just wanted to elaborate on what Lou talked about. I personally feel the way we're doing it now, give it a chance, I think it's working, and I feel that we're being able to represent the people adequately.

Chairman HAMILTON. Okay, gentlemen, thank you very much.

Let me just begin with—one of the things we deal with here in the ethics process is not just how well we have handled the cases or you think we have handled the cases. But you also deal with the public perceptions of how well we deal with the cases. And as you know, they can often be different.

The charge that might sometimes be made, is sometimes made, that when you have members sitting in judgment of other members with whom they have to work day by day, and with whom they will be closely associated in the legislative process in the future, that there is a kind of an innate conflict of interest when members of the Ethics Committee are called upon to judge their

colleagues. And therefore they can't do it as well as an outside body can do it.

Now, I want to say to you I'm being a bit of a devil's advocate here in order to draw you out. Or to put it in crasser terms, we've got here what has been an old boys' network and we are going to protect our own. And now I guess we will have to say because of the new members, old boys' and old girls network. And we're going to protect ourselves within that institution.

How do you respond to that? How do you feel about that kind of a charge?

Mr. STOKES. I think, Mr. Chairman, that let's see, first here, this is a legitimate concern. And it's one that I'm very pleased to try to address. I said earlier, I don't know of anyone who has ever sought service on the Ethics Committee. It is the most distasteful job that one can be assigned serving in the institution that all of us love.

Yet members who serve there serve out of a sense of realization that if you really love this institution, you have an obligation to protect the institution and its principles and its reputation and its integrity. And when we accept service on this committee we do so in that vein, with the realization that somebody has to do the job. Generally it's the leadership of the House that asks each of us to serve in that capacity.

Once there, we realize that the public is watching us, that the institution is watching us, and this member or members and their families are watching us. All three have a great stake in what happens any time charges are brought against a member of Congress. Obviously a member's career, entire life, is on the line. That member and that member's family are very concerned about what happens in terms of their lifeblood.

The institution is concerned because of the public perception you have already raised. Can the institution respond to this particular case in the way that it should, and deal with this member, or will the fact that they serve together every day, they come across on the trolley car together, they sit next to one another, can they under these circumstances put aside this type of coziness and actually judge this member on the merits. And then of course, the public has the same concern.

Mr. Hansen mentioned the fact that we have never had a case that was decided on a partisan basis. The presently constituted committee consists of seven Democrats, seven Republicans. We have never had, on that committee, a vote that came down seven and seven. That is because the members, with the realization that they are put there to consider fairly and honestly with real integrity the charges that are placed against the member of Congress, realize that they must partisanship aside because the stakes are too high.

If I were to try to point to a classic case where something was going to go down in terms of coziness of the institution, the fact that members just cannot judge members properly, you would have to look at the case involving the Speaker. The most powerful position in the House, a position where the occupant of the chair is a third in line for the Presidency of the United States. And while I was not on that particular Ethics Committee, those of us who have

had service on that committee really understood what the members serving on the committee at that time were undergoing.

It had to be the most painful assignment ever given to any member of the Congress in the history of the Congress. And yet we saw them working day and night, long hours into the night, with the realization that they were really trying to do what was right by the three principles that I have already mentioned. And I think the way that it turned out indicated that they had the capacity and the determination and the integrity to do what was required of them.

I just think that when we look at that example, or any other example, I don't think you can find any criticism of the way that they have mastered the task.

Chairman HAMILTON. Mr. Hansen?

Mr. HANSEN. Mr. Chairman, I think Lou Stokes pretty well summed it up. I have to candidly say that when the case came about regarding the Speaker of the House, and at the time we got it, the information was kind of sketch, I thought in my own heart of hearts, we're going to see a big partisan fight here. I really believed that. And coming out as speaker of the house in my own State before I came to Congress, I have some feeling for the man who runs the office, the show, here.

I was pleasantly surprised as we went through that, sure there was a lot of discussion and we had some voices that went up to high C a couple of times and people got a little uptight. That happens in every instance. But in the final analysis, it was done in a totally objective way, and I was very impressed that Julian Dixon, who was chairing the committee, members of the Democratic party, were truly able to rise above this partisanship that we see played on the floor from time to time.

We did a pretty good job. As we know, we never took it out to its final conclusion, because the Speaker of the House resigned. The other side of that, the perception that I saw in the press wasn't the reality of what happened on the floor or in the hearings. And it bothers me in a way that we all seem to respond to perception and not reality. Frankly, I get to the point, what you think in your own heart is right, and let the thing be damned.

And I think that's what members of the committee, even though what we saw that came out all across American from every newspaper, ABC, NBC, CBS, concerning the Speaker, we forged ahead, and as the evidence started coming to us, and it seemed to us that there would be the necessity of calling for some disciplinary measures, we did go ahead with it, and I think it was handled right, and I'm glad the Speaker elected to resign to avoid a real bloodbath around here.

I personally know what you said is absolutely correct. I face that with every reporter that I've talked to as a member of the committee, that it's an old boys' network, but in reality it isn't. And I think what Lou Stokes pointed out, that the institution is more important than the individual, and I don't think I've ever met an individual who is more important than what we're doing here as the institution.

It sounds like I'm a cheerleader for the committee, I'm not. We make all kinds of mistakes in there from time to time, but over a

period of time we'll resolve them, we'll work it out. I think the way we're doing it now, and I agree with Lou, is the new bifurcated system, I would like to see it have an opportunity to work.

Chairman HAMILTON. I'll turn to Mr. Emerson now. But I just want to make a quick reference, Lou, to one of your comments. You seem to suggest in some of the sentences in your testimony that we have under the Constitution a responsibility to discipline our own members. Is the implication of that that if you let non-members do the judging here in these ethics violations that that is unconstitutional?

Mr. STOKES. I'm not saying it's unconstitutional. Because the reference in the Constitution, as I've read it, says that Congress may discipline its members.

Chairman HAMILTON. Okay.

Mr. STOKES. And so I think——

Chairman HAMILTON. You're not really making a constitutional argument that it must be done by members?

Mr. STOKES. I'm not.

Chairman HAMILTON. Okay. Because of the use in the Constitution of the word "may."

Mr. STOKES. Right.

Chairman HAMILTON. Mr. Emerson.

Mr. EMERSON. Thank you, Mr. Chairman.

Actually, you have both given very excellent testimony and in large measure have answered questions that I wanted to ask of you. But let me come at you perhaps in a little different perspective and restate the questions.

Thank you for your testimony, both of you, and also for the wonderful job that you have done as long as I have known each of you in your respective capacities. Frankly, I have never heard anything from members of the House that they thought you were doing other than absolutely required of you and doing it in a very fair manner. As a matter of fact, I don't know any two members of the House who are held in higher regard than the two gentlemen before us for that very reason.

Senator Lott testified before us the other day. He somewhat cautiously suggested that the House procedures on ethics were superior to those of the Senate, and that the Senate could learn from the House. Do you see a need to align the two systems and perhaps even create a joint ethics committee, or should the systems remain independent?

Mr. STOKES. I'm not sure that I could speak as an expert in that respect, Mr. Emerson. I do agree with Senator Lott that the House is probably ahead of the Senate in terms of the matters that we have undertaken and placed in position, particularly as it relates to the advice and education aspects of the House operation.

I would think that in terms of both institutions, there is a great similarity in terms of the kind of matters that come before both ethics committees, that is the House and the Senate. But I would think for institutional reasons we probably ought to keep them separate and apart. I would not think that a joint committee as such would necessarily serve the purposes, or the best purposes, of both the House and the Senate.

Mr. EMERSON. Well, what about merging the rules as they relate to ethics, so that Senators and Representatives are judged by the same standards on the same kinds of issues? That would accommodate your keeping things separate, but should the rules be merged so that we do have a single set of standards?

Mr. STOKES. I think there is merit to considering, at least giving serious thought to that possibility. I would think that that has a great deal of merit. So there is no difference between the two in terms of the ethics and the process for enforcing the ethics of both.

Mr. EMERSON. Thank you.

Chairman HAMILTON. Jim?

Mr. HANSEN. No disrespect to our friends in the other body, but as we go around the country, especially when one of these cases is highlighted, like the check cashing problem we were in last year, the Speaker and others, the press would constantly ask me questions about the Ethics Committee. "You're doing a poor job, how come you don't do a better job?" Then they would go to the Keating Five and things such as that.

I can't remember one case that I could shrug my shoulders and say, that's the other body, we don't have much to do with those folks. And I guess very candidly, in all reality, I seriously doubt if whatever we told them they would do it anyway. But that's their business. I do feel that we have come up with some awfully good ideas and I think we have been rather successful in what we have been able to do.

But I think most of the criticism has come from the other body, and whether it's justified or not I wouldn't be in a position to judge. But I think they would be wise to look at some of the rules that we've come up with and how successful we've been. And I think anybody who looks at another individual or another body to see if they have been successful and somewhat copy what they have been able to do. But in reality, I'm not sure the Senate would pay much attention to us.

Mr. EMERSON. Well, you know, another area here that you've talked a lot about is that of perception, the prevailing perception of institutional bias. The public, I think, generally perceives that anything short of expulsion or hanging is a whitewash. I'm not sure you ever really get over that problem.

But is there a mechanism in your view by which we could convince a skeptical public that the ethics procedures are fair and reasonable? You know, a concern I have, it enters into so many different realms, is that the media, particularly the national electronic media, is willing to take almost any story and exacerbate it. They do so little to educate ore elucidate.

Whereas, in order for the public to have a real understanding of what's going on, they need to understand more of the facts and the details. There needs to be more reporting on reality and less accusation relating to perception. But how do you ever address that? How do you ever really come to grips with that?

Mr. STOKES. That's a very difficult problem, Mr. Emerson, because one of the most unfair things we can do during the process or the course of any case pending before the ethics committee is to be issuing press releases and statements regarding the charges under which a member of Congress is faced. I have always insisted, the

times I have chaired that committee, that we conduct our business as a grand jury would, that in order to protect the individual, in order to protect the rights of the public, that we have a responsibility to do our work, to do it quietly, professionally, efficiently, and then when we have come to a conclusion, to bring out whatever the charges are.

Now that process does not always work in terms of being able to give the media what they want, the meat that they want to hang on the front page to sell newspapers with. But I don't think it's our responsibility to help them sell newspapers. And if in that process we do not get the full story across appropriately to the public, that's just one of the problems I think we have to encounter.

Mr. HANSEN. You know, the history of the West is that when people got all uptight about something, a good hanging calmed them down. You drag some poor guy out and hang him, and then everyone's happy. On the other side of the coin, we got the wrong guy occasionally. As I read the history of some of my ancestors, they got the wrong guy, but everyone felt good about it.

Unfortunately, we get the same thing. Something breaks around here and the public just gets irate. During the bank scandal, we had thousands of calls that came in for the Ethics Committee and to our offices. And as I was ranking on that, everyone was saying Well, boy, throw those guys out. We want them out of Congress. And on the other hand, it took a lot of time, we just pored over reams of paper. We went back—we could have gone back and picked up Abraham Lincoln, you know, that thing started in 1837, if we had wanted to do it, and some people wanted us to. We elected not to do that.

But in reality, I would have to agree with Lou Stokes. Where you have due process, if you are just going to talk about everything that comes about, it seems to me totally unfair. However, in that banking one, we decided, Matt McHugh was heading that at the time, we decided possibly a progress report to the press would be important. We let them know what we were doing.

I was a little disappointed in some of our press meetings. We tried to be very objective, we tried to be analytical, we tried to be a responsible group. And they just wanted blood, in many instances. Some of them were very responsible, some did a good job. I don't mean to castigate all the press, please don't take it that way.

I think that's a tough one, Bill, on how to answer, is how do you take care of this thing, and how do you protect that person. Because first and foremost, the individual does have a right to have it all brought out and someone to do it in a manner that we're not trying him in the press.

I guess I would always come down on the side that maybe it's best to keep the confidentiality of this thing ahead if we can, possibly with the discretion and kind of on a retail basis of the chairman and the ranking member. I think they should, though, maybe be just a wee bit open as to what we're doing, that we are doing something, we're not just sitting there.

I think that's why the press becomes frustrated, they don't think we're doing anything. "Well, you guys are doing something else, we want you to get on this and get ahead with it, get something done." And maybe if we could let it out some way that what we're doing,

the steps we're taking, without in any way prejudicing the situation, maybe that would be a step forward.

Mr. EMERSON. Thank you both very much.

Chairman HAMILTON. Senator Lugar?

Senator LUGAR. Thank you, Mr. Chairman. It was good to hear from both of you gentlemen, and I would just say as one Senator, we would take your advice seriously and constructively.

The impression I have that comes from Mr. Stokes' testimony in which he describes how the process works, that seven Democrats and seven Republicans meet to see whether a complaint merits further inquiry, and if it does the chair and ranking member appoint a four to six member investigative subcommittee, and then they proceed if they find merit or some difficulty there, onto a statement of alleged violation and then the group meets again to see whether there is clear and convincing evidence.

In the last testimony we heard in our hearing, the question was raised about the time frame and the number of steps involved here. I just wonder, from your experience and taking a look at the general grand jury system in the country, whether there is a possibility of truncating this procedure, however well it may have worked for you, so that some group to begin with decides whether there is reason for indictment or there is something there, and the second time through you have the trial.

We have found at least on our side our members are complaining that the preliminary steps are so arduous and time consuming and expensive in terms of legal costs, as well as the press coverage of each of these, almost gives the view that it is a trial, when in fact people were in some preliminary finding. And it jeopardizes the committee about two or three times, because at each stage, the charge of a cover-up or finding some extenuating circumstance are leveled to members of the ethics committee.

Is there any possibility in either house, yours or ours, if we were to have different systems, of having first of all a pretty good idea of whether there is a lot there, and then the second time through, having the trial, and if you have the trial just with the ethics committee, maybe having the overall body say yes or no with regard to the findings, and thus compressing the whole consideration?

Mr. STOKES. Senator Lugar, several factors enter into trying to give you a good answer to your question. Under the House procedure, of course, a complaint can be filed against a member by any member of the House. Also, any person who has presented a complaint to three members of the House who have refused that individual, if they have a signed complaint, they can then file it and that will initiate what we call a valid complaint.

And at that point, we have to do something. And that is, we go into that preliminary stage where we ascertain whether or not there is a necessity to look further into the matter. And at that juncture, that can be done fairly quickly, I think. Because the sole question is, does it merit further inquiry. And if the committee by majority vote feels that it does merit further inquiry at that point, it would then be the chairman and the ranking member's job to appoint the investigative committee.

And so the process, and of course how long that process takes is going to depend upon how involved the case is in terms of the in-

vestigation itself. Then providing for the adjudicative aspect, that can occur very quickly, too, I think. Because once the investigative subcommittee has conducted their work, then it's turned over to the adjudicative group and of course the full body has to come back again and make whatever recommendations are going to be made.

It's difficult to see how you can avoid those three processes in order to try and be fair and have a due process type of inquiry. But I guess the bottom line is, I see great difficulty in being able to truncate the procedure much more than that.

Senator LUGAR. Do you have any other objections?

Mr. HANSEN. If I may, Senator, unfortunately the press coverage precedes our investigation. That's going along for maybe two or three weeks before we really get a hold of it. So it looks like we're going slower than we are. And then as Chairman Stokes pointed out, the nature of the thing. We had one member at one time that was borrowing money from his campaign and investing it. And he started two corporations to invest the money in. And there was money flying all over the place.

So we had to get an auditor in, we had to get a group of accountants in. It took us forever, and that thing was just ending at the same time the press was going wild. Other cases are much easier. And some cases we haven't got it all worked out. The great sex scandal of 1982, which was in effect made up, these young men didn't confess it until we got to the end and found out that a reporter for CBS set them up. And really, you would lay it right at the feet of that reporter if people ever go back and read the thing.

But that didn't fall out until maybe we were 8 or 9 months into it. We found all this information out. Of course, they didn't say much about it when they got on TV that night. That thing, I don't think the American public to this day understands what happened.

But the nature of the beast we're dealing with almost is the driving force of how long it takes. I've seen some that we've had them out in no time at all, because it was so obvious. I would say a true confession, we could count it out, we could go to it, handle it and move on it. But most of them don't fall in that category. They become very complex in the nature that we have to go to.

And I don't think the public realizes it costs an awful lot of money to hire people to go to these things, and we bring in independent counsel and we send attorneys around to depose people all over the United States. It becomes a rather complicated thing to deal with.

Senator LUGAR. This is my second question, and that is, I suppose to the extent which the Senate and the House ought to be involved in these cases at all, just to be the devil's advocate for a moment, why could not a member of Congress who has violated the law be tried in a court totally outside the picture? In other words, why do we become involved in these trials to begin with?

And I appreciate one overall answer that we've heard, that both bodies have to be judges of the conduct of the members and maintain the integrity and the decorum, conduct unbecoming the House or the Senate. But we have found, of course, as we heard Senator Lott and others that on the Senate side at last, our code of conduct is vague, and in many areas doesn't cover a lot of things at all. We

are in the process of sort of writing the law as we proceed on what common sense would tell us is unbecoming conduct.

I'm just simply wondering whether one solution to the ethics committee problem is not to have one, and just to say to persons who file complaints to see the local court system or State court or the Federal court and let them try your case. As it stands, it appears to me that we're really caught in the worst of worlds in which we don't have the normal procedures of the bar and the court system, and it's not that we're amateurs flailing about, but in a way that's the perception of many of our trials here.

Mr. STOKES. I think, Senator Lugar, what you probably run into there is again the public perception of the problem. While the news media is generating all of this media attention to the fact that a member of Congress has gotten into this type of trouble or is involved in a case in court or has been indicted, things of this sort, the public is wondering how can this member of Congress be sitting up there in Congress every day making laws and acting as though nothing is wrong, and this person is under indictment or under trial, things of this sort.

What we have done in the House generally is not get out ahead of the courts. We wait for the court process to take place, if a person has been indicted. We do not interfere with an investigation at the same time that, say, the Justice Department is investigating for the very reason that we may interfere or in some way obstruct the process of justice.

So in most cases, after the action has been taken through the courts, then still the lingering question is, and let's assume the person has been convicted, is that person fit to be serving in the United States Congress as a convicted felon. And of course you've got to take some action on behalf of either body to deal with that particular situation. So I would say, I can't see a method by which you can abolish ethics committees in other body.

Mr. HANSEN. I'd like to add to that, if I may, Senator, that it's kind of like criminal and civil rules. They are different. So we could find a lot of rules that apply to the House and the Senate that we have adopted over the years that wouldn't fall in the category of a court.

But yet, they would bother the populace and our constituents here, and they bother us, to see someone in violation. So that it wouldn't come directly under the Justice Department, we have those cases all the time. I think that because we have established our own rules, it would be difficult to take those out of the parameters of the House and the Senate.

And as Lou pointed out, we're constantly dealing with the Justice Department. Letters are going back and forth on many, many cases, and we'll say, OK, we'll stop, and we'll wait until you get this thing worked out. In some cases it's worked both ways. In some cases they've waited for us while we got something worked out before they went ahead.

I think it would be rather difficult to turn it over to a civil or criminal court of some kind if it doesn't really fall within the parameters of their jurisdiction.

Senator LUGAR. Well, that might be true, but as Congressman Stokes was saying, there is respect paid to the Justice Department,

a core system if someone is indicted, or maybe is about to be. I'm just still confused over the kinds of things that we are trying here that cannot be tried somewhere else.

For example, in the case of the so-called Keating Five, a question there is influence peddling or misuse of authority or what have you. Somebody could file either a civil or criminal suit with regard to that situation, I could think. Sexual harassment is a situation, if the rights of the male or female have been violated, somebody could file a suit, and gain compensation in the courts.

Chairman HAMILTON. Would the Senator yield?

Senator LUGAR. Yes.

Chairman HAMILTON. I think he's at an important point. There is always confusion in these ethics cases between the relationship of a member to follow the code of conduct that we have in the House, for example, and the criminal law. And I think, the way I see it, I don't know if you agree with this or not, but the standards for serving in the Congress ought to be higher than whether or not you have committed a felony.

Our code of conduct says that a member of the House of Representatives, the principal rule is, that a member of the House of Representatives must act in such a way as to reflect credit on the institution. And everything really follows from that basic premise, and we have now put into the code of conduct a lot of very detailed financial rules, for example.

But the rule is that you act in such a way as to reflect credit on the institution. So what I'm suggesting, Senator Lugar, is that I think the House at least is premised on a difference here. And it is quite possible to imagine a case, and we've had them, where a person is not guilty of any crime as such but nonetheless has acted in such a way that does not reflect credit on the House.

And you're charged with the responsibility of judging not whether a member has committed a crime, that's not your business. Your job is to determine whether or not a member has acted in such as a way as to reflect credit on the House.

Senator LUGAR. Mr. Chairman, if I could respond, continuing the dialogue, is it possible that the role of the Ethics Committee could be to separate the two situations? In other words, if clearly the violation appears to be something that is a law violation, fairly clear of some statute being broken, that the committee refers all the parties over to the court system.

If in fact it falls, as you say, in the higher standards situation, in which perhaps a law currently has not been broken, but it really is a nuance or more than that of conduct, then the Ethics Committee will say, this is for us. It seems to be there is a confusion right now in which the check cashing business, sexual harassment or Keating Five, are all on the Ethics Committee. All I'm saying is maybe we ought to make a more clear jurisdiction as to those things that head to the court system and those things that are of the higher conduct type that Ethics Committees deal with.

Mr. HANSEN. I would say if I may, Senator, that some of them would fall under both jurisdictions, in a way. The people expect us to clean up our act, because possibly we should not have a member within our group, our body, that would perform in such a way and still on the other hand, it will go to a criminal situation. And as

you point out very correctly, a lot of people could initiate suits against people, and I'm sure there are plenty of laws, and we are getting more every day, in which to come up with something if they wanted to do it.

We have a rule 43 which we kind of call the catch-all rule that says your conduct doesn't bring disrespect to the House. It's almost like beauty is to the eye of the beholder. Some people think smoking a cigar in the back of the room is bringing discredit to the House and other people make it—it's just kind of where you want to take it.

We have to paw through all those things, and you would be surprised at the amount of allegations that come in, especially during an election year, to members of the House. We candidly have to act as a screening committee to start with, and we throw many of those out because we don't think they are meritorious enough to bring before the committee to discuss.

But I would agree with your conclusion, but I would be a little apprehensive on the idea of saying that the Ethics Committee would screen it and say, well, Justice takes this one, we take the other one, because candidly, as I have found it, we would both operate within the bounds of it. The House or the Senate, to clean up their branch, and let the person out, because they didn't feel to, or do something to censure or reprimand, expel, and contrary to popular belief, we don't have too many tools in our bag to play with.

We can send them a letter, which we have done, we can reprimand them where they stand up, we have an hour in the well. I think in reprimand the Speaker said something. Essentially they have to come into the well, turn around and face the people. It's not a real big deal. If anywhere, maybe we ought to look at some of the things we do.

Of course, the bad one is to expel them. But we don't have the tools that a priest has or a bishop has or a court has, in many instances. We just have so many things that we can do with a person. But I definitely feel that both parties, in many cases, would take jurisdiction and do something to the person.

Mr. STOKES. I would just add, Jim has mentioned rule 43 in the House, which was also referred to by the Chairman, where you make reference to the conduct of a member not reflecting credibly on the Houses. I don't know of any rule that has caused the Ethics Committee more trouble in trying to ascertain what in effect is conduct that does not reflect credibly on the House.

I remember a great deal of conversation that took place between members on the committee and members off the committee about a year or so ago, where a member was involved in a sexual matter in court with a person who was under age. The question was, sure, that's a matter the courts ought to handle. But does that reflect in a way that's credible in terms of the House? And there was a great deal of discussion, both in that committee and outside the committee, on that type of matter.

But as Jim says, it is going to be very difficult for us to pick and choose on this type of thing. I think you have to have something in place to deal with any type of situation that may reflect in some manner on either institution.

Senator LUGAR. I would agree. Let me just conclude by saying that one dilemma I have with all of the discussions we have had on this is the one of substituting our judgment for the constituents who elected the person to begin with, and particularly when you have rule 43, which is extremely vague. And people don't misuse their authority in the ethics committees, and I commend you for your operation, I think our people have done a good job.

But let's take a sad situation in our democracy, in which a group of people said of a member, we think his conduct is totally reprehensible and we don't want him. And we expel him. And the press and the constituents might say, well, we don't think this conduct was that objectionable at all. As a matter of folks, you folks just disagreed with him, or he was so radical in his point of view that he was disruptive. I'm not certain where even free speech, quite apart from free conduct, enters into something that has this degree of vagueness.

But I just simply throw that out as something that sort of underlies all of this. Where does our jurisdiction end in terms of expelling people, even though clearly a convicted felon, there is some independent judgment out there of breakage of the law that offers some sustenance for that kind of judgment?

Mr. STOKES. I think if you're talking about as severe a punishment as expulsion, I think the system sort of takes care of that type of thing. It generally is something of a most reprehensible sort of thing that would be unconscionable to even think of having such an individual continue to remain in either body.

And I think when you look on the House side, we've got punishments that range all the way from expulsion down to a letter of reproval with censure in between, reprimand also in between. I think just the nature of those types of punishments well may take care of that basic type of problem once you can get the vagueness out of the rule itself.

Mr. HANSEN. Don't you think, though, that all members realize the final arbitrator is their constituency? They've got to go out and face them, and you alluded to something that really happened. We had a Congressman who was expelled from the House, if you read the history of the House, went back to his constituents and he was reelected. And of course, if he comes back, no problem. He has the opportunity to do that. And I think everyone should realize, they've got to go out and face the folks. And they are the ones that will make the determination.

Chairman HAMILTON. I want to remind members, we have a second panel here of very distinguished scholars after these gentlemen. Senator Domenici and then Mr. Spratt. Senator Domenici?

Senator DOMENICI. Thank you very much, Mr. Chairman.

Many of the questions and themes that I have in mind have been put on the table and I don't intend to repeat them at all. I want to thank both of you for not only appearing, but I think anybody that's listening today, that's wondering whether we have in the United States House some very principled people in these positions, would leave this part of the hearing very upbeat of what you must be about and what you must be doing.

And I think ultimately that's what this whole process, this whole thing is about, to make sure that the people believe that we are

conducting ourselves through these ethics processes in a way that is consistent with the basic understandings of fairness and service that the American people believe and trust in over the years.

However, rather than talk about the procedures and processes from the standpoint of making sure we get more people and find more people guilty, which sort of seems like is in the air, and Representative Hansen, I really agree with you that what we've got right now is kind of tumult out there, and then you alluded to the West, that it was that way all the time, and then after a hanging, everybody got confident that we had real law enforcement, right?

I think that's sort of what's out there a bit. I don't think that's because members of Congress misbehave more than other people in this country. I think it's because people have less confidence and trust in our institutions and there must be something wrong with the members and they will quickly grab on to almost anything as will the media.

So maybe I could ask you this without divulging personalities. Would you estimate, either of you, how many of the complaints against House members that have made any news at all, that have hit the news in any way at all, that you have concluded were politically motivated from the beginning?

Mr. STOKES. I don't think I can say, though maybe Jim can, how many I would estimate. But let me say, there are an enormous number of frivolous complaints that are filed against members, particularly in the political season. To the degree that what we did on the House Ethics Committee was adopt a resolution that we would not consider any complaints 60 days prior to an election. And that was necessitated by the fact that it has just become commonplace for opponents to file a frivolous complaint against an incumbent and then be able to get good media attention in that Congressional district.

With that realization, the only way we could be fair was to enact such a rule. But I can say to you, there are a large number of those types of complaints. I can't give you an exact figure.

Mr. HANSEN. Senator, I probably couldn't give you an exact figure either, but I agree with what Lou pointed out. In an election year they just heat up. And that seems to be the standard procedure, to send one in on your opponent, regardless how frivolous, how infinitesimal the issue may be, they will come up with that.

And it seems to be the kiss of death if you have an ethics violation hanging over your head, you're dead in the next election. Look on this bank scandal. Most of them resigned right off the bat, and a lot of people lost their elections because of that. Whether or not it was blown out of proportion, I'm not in a position to judge.

But I would surely agree that the vast majority of allegations that come against a member are frivolous and without merit. I have tried to paw through most of the with some of our staff. I get many of them in the mail that come to me. Somebody to the right wing or the left wing doesn't like the way somebody voted on something, they think it's totally unconstitutional, and that person should be thrown out of Congress for that. We ignore the vast majority of them because they are frivolous, they are without merit. It's totally unfair to bring them up.

And I also think it's unfair for the Ethics Committee to look at areas and bring members in on some of these frivolous things to explain it. Just because it came in and the local press picks it up is detrimental to them and totally not fair, in my opinion.

But to answer your question, by far—and I'm not giving a figure—but the vast majority of them are without merit and politically inspired, if I may say so.

Senator DOMENICI. Let me just, Mr. Chairman, for the record summarize quickly from my standpoint where I think we are. We're looking for new mechanisms, to put in new judges, so as to speak. Some are suggesting that we ought not judge our own, we ought not fact find on our own, we ought to have outside commissions, and somebody has a total laymens' commission, others want former members. Frankly, I very much want to be part of reform that has the following quantities, that things get done as rapidly as possible.

Second, that since complaints become political these days, and you almost lose an election even if vindicated, if you go through a very long and lengthy ordeal where there are bits and pieces every day you can't sustain it, no matter how lacking in guilt you were, it seems to me that before we proceed that we ought to make these preliminary decisions that there is nothing to it very quickly and let the member take advantage of that if in fact there has been any notoriety. I think that's got to get out there and get out there quickly.

Third, it seems to me that in our body, at least, when you are accused, you are almost like a defendant in a felony case or worse. You spend, I understand, $300,000 to $500,000 on a number of these cases. I think some of the, Senators couldn't possibly afford it. They have had to have fundraising efforts to get money together to do it. And in a sense they are up against a very, very powerful group, their own members with fantastic legal counsel, these legal counsel now are the finders of the facts. Now, I'm not trying to say we shouldn't police our own.

But I think in this process, for the benefit of the institution, we can't have Americans thinking that they can just frivolously take on a member here. I hope the press doesn't do that, if there aren't facts. And frankly, I think it's not good for the institution for decent Americans to know they may have to go through this and incur this kind of wrath on top of everything else.

So I believe we ought to do everything possible to simplify this ordeal for everybody. And you are better than I in knowing some can't be simplified. Is that right?

Mr. STOKES. That is correct. And what happens, Senator Domenici, is the moment you start an investigation, then that person who has filed this frivolous complaint goes out and holds it up for the newspaper article and starts campaigning on it and of course, while you have not been able to come to any conclusion, every day that incumbent has to face some new charge with reference to the investigation that's ongoing.

You can't overcome the fact that an investigation is going on, notwithstanding the fact that you are completely vindicated later, and the charges that you were under investigation, Ethics Committee investigation. That's why we set the 60 day rule.

Senator DOMENICI. Mr. Chairman, I wonder if we might, without imposing on your Ethics Committee, and I would ask the same of ours, I wonder if there is some way that they could give in an anonymous manner some landscape picture of complaints, the numbers of them, the essential kind of charge, what happened to them over a period of 3 or 4 years, and we would do the same.

Chairman HAMILTON. Without reference to personality.

Senator DOMENICI. Exactly.

Chairman HAMILTON. Yes. I think it's an excellent suggestion. I will ask that the staff contact the appropriate committees and see if we can get a view of it, a profile.

Senator DOMENICI. You see, I think, Mr. Chairman, even if we use that in our deliberations of how many times members are accused, and if it became notorious and yet it's nothing, this is something we ought to be very worried about in terms of what we're going to do with reform. Because reform shouldn't all be on the side of let's make sure we kick out more Senators and Representatives from these institutions.

That shouldn't be our sole purpose and have good people like you not hearing your members. That shouldn't be our sole purpose here, either. It should be justice within the framework of a democratic electoral process and representative government, which is much different than anything else in these judicial systems and the like.

Thanks, The CHAIRMAN.

Chairman HAMILTON. I think what Senator Domenici is asking is really an expansion on what you have in part on page eight of your testimony.

Mr. Spratt?

Mr. SPRATT. Thank you, Mr. Chairman.

I was not here to hear your testimony, but I was able to read it, and I'm sorry I didn't get to hear it. And I'm not sure what has been asked before, but at the last hearing we had opposing points of view. We had members who came and said that if an outside tribunal body of amateurs or body of ex-members were called to sit in judgment, ethical judgment of members, that they probably wouldn't understand the context. They wouldn't understand the nature of the work, and it would not be easy for them to pass judgment because they're simply not—it would not be peer review in the proper sense of the word.

On the other hand, we had members who came and said, in the eyes of the public, we will never be seen as impartial and disinterested, and as able to discipline our own and consequently to redeem the public's esteem for Congress and our own reputation, we have got to have a completely outside body of citizens who would sit in judgment. And the last two witnesses we had presented a bill that they had filed which excluded even ex-members from sitting on such a panel.

Would you share with us, please, because I take it, particularly Mr. Stokes, from your testimony, that you don't think well of such an idea, what the practical problems would be with having an outside body of citizens to in effect be the first tier of an ethical adjudication process?

Mr. STOKES. Certainly, Mr. Spratt.

Let me first start with the fact that if we're excluding former members and just going to the outside public as such, I think there would be some problem in their not being familiar with the institution and with its mores, with its precedents. I think that to some degree can be a handicap in the sense of lack of familiarity itself with the institution and its history.

I see in the case of former members some additional problems. Most former members, when they leave here, go into some other profession or go back to the profession which they came from. I can see the possibility of conflict of interest, that is former members perhaps who are lobbyists, perhaps are in a profession that makes them come into contact with current members of Congress where conflicts of Congress could arise, who knows what they may be or what would come up when those types of situations come to the fore, and then the public would say, well, see there, that wasn't good, they are still cronies with those same people up there, and so forth and so on.

I just think, that when you think of how things change here, even for former members that have been away 5 or 6 years, are not familiar 5 or 6 years later with conditions in this body and this in situation as they are currently. Because things here change, too. And I don't think that just being a former as such puts them in a better position to be able to judge.

I just think that we ought not to try to dodge the responsibilities we have as members of this institution to police our own and to deal adequately and promptly and sufficiently with any members of either body who violate the law or who violate the rules and regulations of this institution.

Mr. SPRATT. Mr. Hansen?

Mr. HANSEN. Well, if I may, Mr. Spratt, as I look at this thing, I personally feel that the members of the House, especially, I can't speak for the Senate, have been very, very sensitive as they looked at these cases. And what is said by the press is not sustained by fact.

If they say that and that is the perception of it, we can't police our own, I come back and say, name me the case. Give me the case. I have been on this committee for 12 years, I have sat through 27 of them, show me one where we didn't take adequate action, and the vast majority of people at the conclusion of it, including the defendant, has said we think you were fair. Well, many times that person didn't feel so, but most people did. And the House sustained us.

Sometimes we had some very lively debate, as you may recall. But most of the time they sustained us in what we came up with. So I don't history supports that argument. And I don't think we're the kind of body that should react because someone gets a bee in his bonnet and gets all upset because he thinks we can't do it. As we discussed before, on some of the other questions, yes, they want immediate action.

And I think Americans are so accustomed to getting everything immediately when they want it, we can't give them immediate action. We have talked about that. We are driven by the nature of the case. If it's a very complicated case, we've got to work a long time. If it's a simple case, we can get it out. But we just can't give

this person due process and move immediately on every case. But I don't think that they are right in that assumption.

And then it's got some very obvious practical problems. Let's say that you're on the Ethics Committee but we put some outside group on it. And they work on it for 4 or 5 months and they say to you as a member of the Ethics Committee, we want to censure this person, we want to expel this person. Now you've got to get up to date in a big hurry and walk on that floor and convince your colleagues to go along with that. That's an extremely difficult thing to do.

But if you were part and parcel of the investigation, of working out the problems, the depositions, coming up with the final conclusion, you could do it very easily. But now to walk on, I wouldn't want to do it. I would shy away from that a hundred ways to think that I had to walk on and try to take what this independent group came up with, unless we change the rules of the House and let somebody walk on the House floor and do it, which I seriously doubt we will, it's got some very inherent practical problems on how you would do it.

Mr. STOKES. I wonder if I could just add one other thing that comes to my mind. I think something that's built in here as a good safety valve and that is that the House is the final arbiter of the action to be taken against any member of the House, regardless of the recommendation of the Ethics Committee. I'm reminded, and we conducted the sex and drug investigations involving members of the House and the House pages. Our committee came back in and we recommended action be taken against two members of the House. And in each case we recommended a reprimand.

The members of the House did not accept the reprimand, and there was discussion, extensive discussion on the floor with reference to the fact that the punishment should be higher. The House did raise the punishment to that of censure, and in that vein, they were reacting in terms of the politics of the day and the way they felt their constituencies would feel, that this was not severe enough for a member of that body.

And I think that's much better than someone who is outside and not as close to the people as the people who serve in this House and who are the better judges of the type of punishment that ought to be meted out.

Mr. HANSEN. May I add one thing to that? In the case that Lou's referring to, those particular cases were fallouts. They were situations that we uncovered during about 70 depositions through that. They were not the direct allegations that came out. The direct allegations were made against members of the House, and that was made up by a reporter of CBS who planted it in these young minds, which no one really kept in mind at that particular time. But the real problem was the allegations made by CBS and made by these pages that they later recanted on.

Mr. SPRATT. Fictitious.

Mr. HANSEN. Absolutely made up. So if we had reacted the way the press and the media and the way the people wanted to react, they would have done what we kiddingly said earlier, we would have dragged these people out to the nearest tree and put a slip-

knot around their neck and got this over with and made everybody happy about it.

Mr. SPRATT. Well, are you suggesting, then, if we had an outside panel of outside citizens that they would be more want to do that, to rush a judgement and condemn the whole lot as opposed to methodically going through 70 depositions and sorting out who truly is guilty of such an offense?

Mr. STOKES. I don't think I'd say that. I would have no way of knowing that such a group would not do the job meticulously. I'm just saying that I think the institution has the responsibility to do that themselves and that they can do it, and I think the record reflects that they have done it, and that there is no reason for us, if we're talking about reform, there is no ground been laid here for having to resort to an outside type of process.

Mr. HANSEN. I can't second guess what they would do, but I would seriously doubt in the 27 cases that I have sat on that the results would have been much different. We took some very stringent action.

Mr. SPRATT. Thank you both very much.

Chairman HAMILTON. Ms. Holmes Norton?

Ms. NORTON. I have no questions.

Chairman HAMILTON. Senator Domenici?

Senator DOMENICI. Could I just make sure that once again, for the record, that we establish one point very strongly here, if I'm correct. Would you not both agree that one of the reasons this approach in the House is fair is because it is bipartisan to the T? There is an equal number of Democrats and an equal number of Republicans regardless of the makeup of the House and Senate, so you don't have more Democrats judging a Republican and vice versa. It's an equal number. Is that not an important part of the process?

Mr. STOKES. I think that's an extremely important part of the process. But even more than that is a sense of feeling amongst them that not only must they not resort to partisanship, but they must utilize the bipartisanship aspect of it to try and arrive at the right decision on behalf of the institution. I agree with that.

Mr. DOMENICI. Thank you, Mr. Chairman.

Chairman HAMILTON. Thank you very much, Representatives Stokes and Hansen. It's been an excellent morning. We have appreciated all the time you have taken. Obviously the questions indicate the questions that members have. We thank you for your service and for your testimony.

We will proceed with the members of the second panel. I will ask them to come forward if they would at this time. We hear from Harold Bruff, of George Washington University and the American Bar Association, I think he's representing the ABA's Committee on Congressional Reform; from Alan Rosenthal, of Rutgers University, who has very extensive knowledge of government ethics procedures; from John Saxon, of the Hastings Institute, who will address the question of legislative ethics generally; and Mr. Dennis Thompson, of Harvard University, who will speak about procedures other self-regulating professions use to maintain proper ethical conduct.

So far as I know, at least, there is no particular order of presentation. I understand that you have been asked to keep your com-

ments to about five minutes to open up. We would appreciate it if you would respect that as closely as you can.

We will begin with you, Mr. Rosenthal, and just move across the table. The Chair's intent would be to hear from each of you first, and then to turn to questions. We are very grateful for your appearance this morning, and we look forward to hearing from you.

Mr. Rosenthal?

STATEMENT OF MR. ALAN ROSENTHAL, PROFESSOR OF POLITICAL SCIENCE, RUTGERS UNIVERSITY, DIRECTOR, EAGLETON INSTITUTE OF POLITICS

Mr. ROSENTHAL. Thank you, Mr. Chairman and members of the committee.

I'm here to report on what's going on in the States with regard to State legislatures. I'm not an attorney, I'm not a constitutional scholar or an ethicist. I am a long-time observer of State legislatures.

I don't think I'm exaggerating, at least not much at any rate, in maintaining that American State legislatures are currently undergoing a crisis in ethics. Legislatures in most of the States have been challenged recently from within and from without to enact ethics reform legislation and raise the standards of member behavior.

In my opinion, legislatures and legislators generally, like members of Congress, are being unfairly accused. The ethical behavior of legislators is better today than it was in the 1960s, but public expectations and standards have risen markedly and press scrutiny has intensified, and legislatures cannot seem to catch up.

Furthermore, there are instances almost everywhere of corruption and lesser abuse. In the past few years legislators have been indicted and convicted as a result of stings in California, South Carolina, Arizona and Kentucky. Other scandals have shaken legislatures in Florida, Texas, Tennessee, and even in Wisconsin, a squeaky clean State with stringent ethics laws. When one or a few legislators stray, their colleagues and their institutions almost suffer in the opinions of the public.

I'm going to comment today on the comparable merits of inside legislative committees governing ethics and outside independent commissions acting on legislative ethics. And I'll speak primarily with regard to those experiences, the States in which I have had recent experience.

In 1990, I was appointed by the speaker of the New Jersey Assembly and the President of the New Jersey Senate to chair a commission on legislative ethics and campaign finance. The commission was created because Democratic Assembly leaders were then under fire for allegedly shaking down a lobbyist for the trial lawyers to finance their party's 1989 legislative campaigns. The commission never seriously considered the establishment of an independent ethics commission, but we did recommend that the joint legislative committee on ethical standards be enlarged to include a few public members in addition to the legislators who were serving. That recommendation passed.

Now, since that time, I really have changed my view. At that time I thought a legislative committee with independent or public members would be able to do the job. But in my recent discussion of practices in the States, I think that I have noticed that an inside committee has not been adequate. I have a preference now, albeit a grudging one, for an independent commission.

As the principal ethics overseer, legislative committees that are inside the legislature have one significant advantage: members understand the legislative institution and the process, and thus they should be better able to make good judgments on cases and on policies. The disadvantage, I believe, is outweighed by severe disabilities in the mechanism.

First, members are reluctant to serve on such bodies, and have little incentive to pursue any type of ethics agenda. Second, members who are pressed into service naturally are reluctant to punish colleagues with whom they have empathy and whose support they undoubtedly will need on one matter or another. The member who chairs such a committee is in a particularly unenviable position.

Third, in States with highly partisan legislatures, such division may also be reflected in decisions of an inside committee, and that does happen. Fourth, whatever the job they do, committees on which sitting legislators serve have little credibility with the press, and probably little with the public as well.

For members, it is a no-win situation. Their colleagues are likely to accuse them of succumbing to pressures from the press and the press is likely to accuse them of being too clubby and trying to protect their colleagues. Even if such committees perform well, they will not be perceived to be doing so. Moreover, there is a real question as to whether any inside committees that have major responsibilities manage to do the job. What evidence there is appears to support the notion that legislators, not unlike members of other professions, cannot satisfactorily regulate their own ethical behavior.

The alternative to self regulation, that of regulation by an independent commission, is not without problems. And such problems should not be discounted, but it is possible for legislators to live with them. And I think the prospect in the States is for more such commissions, especially as the body of ethics laws grows. The larger the amount of law, the more there is for an agency to administer and the greater the need for an agency separate from the legislature. More law would seen to be in the offing in the years ahead.

Less than two weeks ago, the Kentucky General Assembly concluded a special session on ethics called in response to an FBI sting and the indictments of current and former legislators, including the speaker. The legislature passed an omnibus ethics bill, one provision of which was the establishment of an independent ethics commission.

There was little doubt during the session that the legislature would no longer leave ethics up to an inside body, but rather would go the independent route. The new Kentucky Commission is empowered to investigate any violation upon complaint or on its own, and it may reprimand a violator or refer the case to appropriate prosecutorial authorities or to the legislature itself. The commis-

sion will also be issuing advisory opinions to members and promulgating administrative regulations to implement the ethics code.

Currently, there are relatively few independent commissions that have jurisdiction over the legislative branch. The ones that I know of are, in addition to Kentucky's new commission, are commissions in California and Connecticut.

In Kentucky, the legislature maintains control over the appointments to the commission and the legislature feels this is important. In California, the legislature does not retain control, even over the appointments to the commission. The Governor and other statewide elected officials maintain control. The California legislature has no control over the ethics committee in terms of appointments, but it does have some say over its budget and it may seek to exercise influence over the commission in that way.

The initiative that created the FPPC in California also earmarked $1 million annually for its budget and a cost of living increase for the agency. But over the years, the legislature has added to the funding as the legislature has added to the responsibility to the commission. And the legislature can take away what the legislature gives.

The case of California, which has had the FPPC for almost 20 years now, suggests that substantial ethics legislation and its administration by an independent commission will lead to voluminous and complex regulation. Members are always seeking advisory opinions informally by telephone or formally in writing. It is practically impossible for California legislators to travel officially without turning to legal counsel for advice. And I have listed in my testimony some examples of the types of questions that arise in California. And there are obviously more such questions.

It is unpleasant for California legislators to have to operate in this regulated environment. It is even more unpleasant for them to have to go on with their business in the midst of a Federal investigation into legislative corruption that has gone on for almost 5 years. They feel that they are being nit-picked to death by the commission, and it is easy for them to point to mindless regulations. But law begets regulation and regulation begets additional regulation. And whenever a legislators seeks an opinion or ruling from FPPC, he or she may be adding to the regulatory load.

Legislators, I think, cannot reasonably expect comfort from an independent ethics commission, and certainly not the same understanding and sympathy they receive from their colleagues on a senate or house committee. The relationship between FPPC and the legislature in California has been an adversarial one. The organizational culture of FPPC is dominated by a law enforcement orientation, and one that is highly suspicious of politicians. We are here, commissioners and staff believe, to keep legislators honest.

Such an agency probably cannot be protective. If it did so, it would lose its momentum, its raison d'etre, and its credibility with the press and the public. If the relationship cannot be an amicable one, all that the legislature can reasonably ask is that the commission be fair. In both California and Connecticut, ethics commissions have been strong and fair. On balance, they also appear to have worked.

Thank you.

[The statement of Mr. Rosenthal is printed in the Appendix.]
Chairman BOREN [presiding]. Thank you very much.
Professor Thompson?

STATEMENT OF MR. DENNIS F. THOMPSON, PROFESSOR, HARVARD UNIVERSITY

Mr. THOMPSON. Thank you, Mr. Chairman, and your colleagues, for inviting me to comment on some of the issues you are facing as you consider possible changes in the procedures for enforcing ethics for members of Congress.

I first testified on Congressional ethics back in the dark ages, or good old days, depending on your sympathies, back in November, 1980. I favored then what was an heretical idea of an outside body to investigate ethics charges and make recommendations to the Senate. That did not win universal applause then, and I'm under no illusion that it has won universal acceptance yet, either. But I am pleased to see that it is receiving serious consideration and there are a number of proposals from members themselves on both sides who favor it.

I still favor the general idea. I think there are some problems with it. I appreciate the opportunity you have offered me to explain why again. I have submitted a longer statement for the record, and I will spare you that. But I will make a few general remarks from that statement.

The basic idea is that no one should be the judge in his own cause. This maxim, which has guided judges of cases and makers of constitutions since ancient times, expresses the fundamental values of limited government and due process. It grounds many of the provisions in our constitution. Hamilton and Madison both in the Federalist papers, as you know, apply it not just mainly to individuals but also to Congress, institutions.

That principle serves two purposes. It first helps prevent biased judgments by eliminating some of the most common conflicts of interest, namely those that arise when the interest of the judge and the judged overlap. I won't dwell on that, that point has been well made by Mr. Hamilton earlier. And I think it does add up to a powerful reason that suggests that when a legislative body investigates charges and disciplines a member, it's not fully observing this principle that one should not be a judge in one's own cause.

Even if the legislature reaches an objective judgment in a case, which in my opinion in fact most of the ethics committees histories I have had experience with, that actually happens, it does reach an objective judgment, even in that case, in those cases, citizens may have good reason to doubt that the judgment is objective. And that brings me to the second purpose of the principle, which has also been referred to here frequently to promote public confidence in the process of enforcement.

There is a tendency to dismiss this point by treating it simply as a problem of perception or a matter of appearances. Public perceptions are often distorted, that's certainly true. But given the circumstances of a conflict of interest that I have just described and several people have emphasized, given those circumstances it

seems to me that citizens have some reasonable grounds to worry that the process may be biased, even when in fact it's not.

And I want to separate the reasonable grounds they have from the distortions that the press often creates. Because the conditions for biased judgment really exist, whether the biased judgment exists or not, citizens are warranted sometimes in treating the appearance of bias as a reality. So it becomes an ethical failure, not just a political failure, for a member or a committee to take into account the reasonable reactions of citizens, not all of the reactions. And if that's right, appearance matter ethically, not just politically.

So these two rationales or purposes for the principle that one should not judge in one's own cause would imply, in the absence of other considerations, that Congress should not be the sole judge of its members. But there are, there are other considerations, and they do or may suggest that we ought to modify this conclusion. I'll mention three of them briefly.

The first consideration often takes the form of an objection, points to other professions, medicine, law, journalism, which have favored self-regulation as the means of enforcing their own professional ethics. Many professions are more subject—well, let me say, in my statement I give a number of examples of this.

But it seems to me that in the end, the existence and the success of self regulation by other professions turns out to be exaggerated, that either they are not as self-regulating as we sometimes assume or they are not as successful as they sometimes assume. Law as an example is not as self-regulating as is often assumed. In medicine, it's not as successful at regulating its ethics as we sometimes assume. I give some evidence in my statement for both of those.

I can't resist mentioning, though it may cause me to run a little over, the profession that has most successfully resisted outside regulation probably, of its ethics, is journalism. It typically wards off this particular evil by waving the First Amendment in front of attackers. Now, whether the ethics of journalists is higher than that of other professions, I leave to others to judge. But it would be ironic if to defend your own claims of self regulation legislators were forced to point to the press as their chief example of a successful self-regulation profession.

Those who favor self-regulation in Congressional ethics ought to take little comfort from the record of other professions. Either they are not as self-regulating as they appear, or not as successful as they claim.

A second objection to the proposals for an outside body has also been mentioned here today, and in earlier testimony, and it's the fact that legislators are accountable to voters. Legislators practice their profession in public, and they risk every 2 or 6 years losing their license to practice. So it's argued Congress should require only disclosure and let the voters decide whether a member is ethical or not.

The trouble with that line of argument is that all of us, all citizens, have an interest in the conduct of all members, not just the ones whom we can vote for, because we all have an interest in the effect and credibility of Congress as an institution. Yet when citizens vote for their own representative, they are generally more

concerned about their own district or State than about the institution. So the electoral connection is not a very effective substitute for enforcing institutional standards, and it may even interfere with fair and impartial internal proceedings in ways that I suggested earlier.

The third objection I'll briefly mention appeals to Congress' constitutional responsibilities. That was also mentioned again this morning, and I think that objection has some force. In fact, it is ultimately the reason I would not favor a completely independent agency to enforce ethical standards in Congress. I don't think it's the legalistic point.

I think you can read the two clauses in the Constitution in a way that would be quite consistent with delegating quite a bit of that authority. But I am concerned, and I think members have expressed this concern, that there is a responsibility, an ethical responsibility, to take judgments of one's colleagues seriously, and that the final judgment, in my view, should be made on the floor of the House or the Senate.

I have some views about the particular mechanisms and the four or five bills that have been proposed, but I would just conclude by saying that I think it is a matter of principle, it's a matter of constitutional principle, that leads me to conclude that some significant authority ought to be granted to a body whose members are not members of Congress.

That's a principled solution to the problem of ethics enforcement, it seems to me, and that Congress would be demonstrating confidence in its members and in its integrity by entrusting part—part—of the process of enforcing ethics to the citizens who could in no way be considered to be judges in their own cause. By establishing such a body, Congress would be fulfilling its responsibility, not abdicating it. Thank you.

[The statement of Mr. Thompson is printed in the Appendix.]

Chairman HAMILTON [resuming Chair]. Thank you very much, Mr. Thompson.

Mr. Bruff?

STATEMENT OF MR. HAROLD H. BRUFF, ROTHSCHILD RESEARCH PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY; CHAIR, CONGRESSIONAL PROCESS COMMITTEE, AMERICAN BAR ASSOCIATION

Mr. BRUFF. Thank you, Mr. Chairman.

I am chairing the ABA's new committee on Congressional process. Our committee has yet to make any recommendations, nor has the ABA, so I will speak to you mainly today from my status as law professor at George Washington University, but also to try to get a dialogue going with your committee on issues that ours will consider and will recommend to you in due course.

My first thought to you comes from the standpoint of separation of powers. I think it is clear that the final decision to punish members of Congress must be kept there, but that the preliminary stages can be structured very largely as Congress wants. I think that's the burden of the Supreme Court's new Nixon case on impeachment procedures. So although no one can take away the final

decision to punish your members nor can you give it away, I think you can do the preliminaries as you care to.

I want to make just a couple of main points about structure and process, and will refer you to my statement for others. The main thing I would have you keep in mind as you consider proposals for such things as independent commissions to do the preliminary stages of investigation would be this: I think it is all a matter of trading off one set of advantages or disadvantages for another. There is unlikely to be any ideal system. What there will be is structure that will better serve a particularly premise at the cost of disserving another.

Here's what I mean. When you bring in outsiders in the preliminary stages, there are obvious gains in higher public confidence as the body becomes more remote from Congress. There are obvious costs in the loss of understanding and empathy for those of you in the body. You can't have all of both. So that as you add more outsiders with less contact with the institution, you can more easily represent it to the public that these folks aren't members of the club, they are neutral cops, you know the language.

But then you have the danger that I heard Mr. Rosenthal remark about with the California commission, you get all sorts of deleterious effects on the primary behavior of members of your institution day by day, because you think you are walking around with an unsympathetic cop right behind you. As I walk back to my car on Capitol Hill, I may encounter a District of Columbia traffic enforcement officer. I don't think you want a body with the essential attitude that I will encounter if I meet such an individual.

So there's the tradeoff. One thing I would suggest to you is this. As you have the final responsibility to punish your members, you cannot give away the power to condemn. And when you do condemn a member, or clear a member finally, the public may think, well, it's just members of the club making that call. But I don't see any way to fix that. I thought Mr. Hansen was eloquent this morning in saying that at some point it's the institution's responsibility at the end of the day.

However, what a preliminary group may be able to do for you, you would hope could do for you, was a more persuasive clearing function than you think you can have yourselves, because of the typical public reaction to these things. But let me say this. That consideration suggests a relatively independent body, doesn't it? The more independent they are, the more public confidence goes up, maybe even former members should be eschewed on the thought that alumni are loyal to the institution.

The problem there I see is this. With the loss in understanding that comes with that, it may be that a clearing function would finally be effective and powerful, but oh, my, so would be the bringing of a charge. So I think it raises the stakes in a way beyond the ordinary nature of the preliminary investigations that you have now, which as you know already have very powerful condemnatory effects just by the fact that they are processing something. So that's one consideration. I don't have a way out of it for you.

A primary thing for you to think about as you craft your own rules for behavior is I think you need to marry them to the structure you choose for policing yourselves. I was sitting listening this

morning to the two members of the House committee saying, now, both bodies of course have rules about conduct unbecoming. Well, I used to be in the service, and I knew I couldn't engage in conduct unbecoming an officer, and somebody within an institution kind of knows what that is.

But I'm not sure people outside it do. I'm not sure what each of you would consider to be conduct unbecoming yourselves. Therefore, if you create an institution for a preliminary investigation and recommendation whose center of gravity starts to migrate from your institution, you'd best look back at your rules and decide whether they can be understood and preliminarily enforced by a body of persons who don't drink the water and breathe the air that you do every day.

An example of this. I have been looking, our committee will look at constituent service problems. So I have been looking at, for example, the new Senate rule 43 on linkage between constituent service and campaign contributions, and on the House Advisory Opinion Number One that treats the same subject. Both of them seem to me to say that members of Congress think that they can separate contributions and constituent service in their own minds and that they ought to.

I'm not sure the public can be persuaded of this. I think of the press reports of the Keating Five. That's an example of the sort of thing where I think you need to revisit it and ask yourselves, okay, do we have rules for our own behavior that we cannot use either a self-enforcing system for or a partially independent system for without creating special problems?

Then two quick points on process. One is this. I think all of you hope, and all sympathetic citizens hope, that ethics committee consideration of outright violations will be a rare event. We need to try to structure the system so that is true in practice as well as in hope. What I have in mind here is to try to stress not just the final, formal structure of it all, the formal rules that you must obey, but also the informal initial stages of the process in a way that produces results we hope that are speedy.

As Senator Domenici emphasized earlier, and it couldn't be more important in the poisonous atmosphere that sometimes surrounds these things, and that get rid of violations wherever we can. One thing to do, I think, is to try to strengthen the advice-giving functions that members can now avail themselves of. A problem avoided is a problem never discussed in the papers or in even the preliminary stages of the process.

Similarly, it may be that just changing internal processes of Congress to open some of them to public view may ensure that there aren't charges after the fact that well, Senator or Representative X is hiding something, because he or she did it behind closed doors. So your own disclosure rules, I know the Senate Task Force is going to ask some of these questions, may help prevent some of these problems, too.

Then I think also you need to look at process before the ethics committees. Our committee will try to do that, fair process, disclosure and all that.

But as part and parcel of that, I suggest something suggested to me by Dennis Eckert of our own committee, who along with Frank

Horton and Abner Mikva are former members serving with us, he said you need a kind of referral process of the sort that will help you avoid some of the problems that Messrs. Hansen and Stokes discussed this morning of election season complaints, this sort of thing. He says you need a referral process that will send election complaints to the Federal Election Commission, some everyday ministerial problems like I'm not being paid overtime by my member of Congress, correctly. That goes into the bureaucracy. And real ethics problems go where they should.

We can maybe even think creatively about informal alternative dispute resolution mechanisms, who knows what, to try to avoid the train wrecks of the final contentious, painful consideration of matters before the full ethics committees at the end of the day. That's the sort of things we hope to think about and to talk to all of you to get every idea we can from you.

Thank you.

[The statement of Mr. Bruff is printed in the Appendix.]

Chairman HAMILTON. Thank you very much, Mr. Bruff.

Mr. Saxon?

STATEMENT OF MR. JOHN D. SAXON, PARTNER, COOPER, MITCH, CRAWFORD, KUYKENDALL & WHATLEY

Mr. SAXON. Thank you, Mr. Chairman. It's my pleasure to be invited to provide this testimony.

I am an attorney in private practice in Birmingham, Alabama, but for three and a half years in the early 1980s I served as counsel to the Senate Ethics Committee. Being from Alabama, that was initially under Senator Heflin, but also under Chairman Wallop and later Chairman Stephens.

During that time, we had investigations of former Senator Howard Cannon of Nevada and also of Senator Harrison Williams, the ABSCAM investigation. Of course, the electoral process took care of the investigation of Senator Cannon, but we spent 2 years doing an investigation of Senator Harrison Williams. So I draw on that experience largely in these remarks.

I should say, I have served on the staffs of three other committees, including the Iran Contra committee under Senator Boren, Senator Sarbanes and Senator Cohen. So I've got enormous affection for this institution.

Let me quickly highlight two preliminary observations that are in my prepared testimony that I think are necessary for context. One is that public officials, both elected and appointed, at all levels of government are finding themselves in a new era in which there is precious little time for public atonement once allegations of ethical misconduct surface. This is not the time or the occasion to elaborate on that, and perhaps no elaboration is needed.

But I mention that because it has two results. One, it means, as you have already heard testimony this morning, we need to do everything we can to accelerate the process, because these charges are hanging over the member's head. But there is a tension between the second result, and that is that because the charges are so explosive, and because the result to the member is potentially so devastating, the institution has an obligation to see to it that proce-

dural due process is followed and that fundamental fairness is followed, and there is a tension between those two, because the latter tends to stretch things out. So I simply highlight that, I elaborated on it a bit more in the prepared testimony, but I think that's important to mention.

The second observation that I want to mention that is developed in more detail is that whatever changes this committee recommends should be measured against whatever you determine to be the goals of an ethics disciplinary process. I have outlined in my prepared testimony nine possible objectives, as I thought about this, the types of things that you want an ethics disciplinary proceeding, the goals you want it to serve, such as maintaining high standard of ethical conduct, preserving the integrity of the process, promoting the principles of openness in government, fairness to all the parties, and so forth.

But I think it's important that before you sign off on a specific procedural recommendation you measure that against what precisely the two committees ought to be doing when they consider charges of misconduct against members.

With those observations out of the way, let me address a couple of specifics. One, I do very strongly believe that some system of bifurcation such as the House has gone to should also be followed in the Senate, at least on an experimental basis.

And I say that for several reasons. One, it serves partially to reduce the burden on the members. All the members who have served on any kind of investigative body, but particularly the ones who have served on the ethics committees, know it's a thankless task, a terribly time-consuming task.

The second thing that bifurcation does that I think is more important is that it helps to better meet the goal of fundamental fairness. And I say that even if you choose to send part of the fact finding out to an outside panel, if you break it up that way, you're going to serve the interests of fundamental fairness. Now, why do I say that?

Let me take a second or two and explain, for those who have not been through it, what the practical stage by stage effects are of an ethics investigation with the ethics committee. Stage one, you are using the in-house staff, that staff that you have hired, that you work with daily, generally you trust their judgment, and they are doing some preliminary fact finding because a complaint has been lodged.

And then the come to you and they tell you that yes, in fact, there is a threshold of proof to go forward to the next level, and consider hiring an outside counsel. We all learned in evidence class in law school that you can't unring a bell. So from day one, in ex parte proceedings, the members of the committee are hearing their own staff come in and say, yes, we did find that witness, we chased her down, we got her affidavit, we took this deposition, and yes, it's what we thought. So we probably ought to go forward to the next stage.

So then you go forward to the next stage, and that's selecting an independent counsel or the special counsel, as it is in the House and Senate. And you interview them. So you bring them in and you talk with that potential special counsel about the facts and

what you think, how the case is shaping up. You spend a lot of time with them, you develop rapport with them, you give them some kind of mandate as to what it is they need to go out and do. A threshold has already been met that the evidence rises to.

And then, day after day and week after week, you work with that special counsel. And that special counsel is giving you interim reports of more evidence that they have gathered and more witnesses they have interviewed. Again, it's all largely ex parte. Nobody has brought in the member yet, or his counsel yet to hear what the other side is.

And this is slightly overstated, but not much. The special counsel develops a vested interest in this investigation. You put your blinders on, I did it myself in a different context with the Iran Contra investigation. You get into it and you can't see the other side, necessarily.

So lo and behold, surprise, the special counsel comes forward and says yes, as we thought, Senator X is a stinker. So now we have public hearings, at which the prosecutorial stage takes place with the special counsel. By that point the committee has heard pretty much a one-sided story. And even though the members that I've observed, the special counsels I've observed and the staff of the committee are all conscientious and try to be professional, try to be objective, it's just a little too much to ask.

And so for that reason, I believe that there needs to be some bifurcation of the proceedings so that the investigative function is done by a different body, different panel, whether it's internal to the institution or external than the body that sends the charges to the floor of the chamber.

The second thing, let me address the outside panel. I'm still somewhat ambivalent on this notion. But I think that probably there is merit to it. Number one, the process is terribly time-consuming, as I said, and if you can break out part of it, and give to another group of individuals, that has great effect. When we were getting ready for the Senate expulsion debate on the floor, back in I believe February of 1982, Senator Heflin was holed up for about three weeks in the marble room, I don't know if you all remember that.

But he didn't go to his office most days. And he had all of his materials in his briefcase. He took that very seriously, and I think the Senate was well served by that. But the point is, it was at the cost of other things that were important to the people of the State of Alabama and other issues. And that was just for the concluding portion of what was a lengthy 2-year investigation.

Second, I think an outside panel serves the appearance of objectivity, and that's very important. I don't need to tell the members of this committee what the public's views are these days. But beyond that, it also serves the substance of objectivity. And I think because of what I have described a few moments ago, I think a bit of distance in perspective may be beneficial.

I should point out, though, that I think that former members may well need to comprise at least some portion of any outside panel that's resorted to. And in pages 14 to 20 in the prepared testimony, I tried to describe the environment in which members operate. I think it's very important that anyone doing the judging in

a ethics disciplinary proceeding understand the competing and often conflicting duties and obligations and roles that members play, the different hats they wear. And if someone doesn't understand that, then I would be very reluctant to have them involved at any stage of this process.

And I think finally, and maybe this is a cop-out, but I think that an independent, outside panel, however comprised, gives members a bit of a buffer. It's very difficult to take a member of the ethics committee who is junior. Senator Harrison Williams, for example, had been in the Senate for 22 years when we started that investigation. Chairman Heflin had been in the Senate about 10 months. Senator Pryor had been in the Senate 10 months. That's very difficult.

We started the investigation of Senator Howard Cannon. Senator Heflin was on the Commerce Committee. That was his chairman. It's very, very difficult to be engaged in the distasteful process of judging one's colleagues. So I think it would help to some extent to provide a bit of a buffer.

The final thing I would simply mention on a different topic, and that is, there are benefits to having a general standard such as reflects no discredit on the institution. There is a procedural due process notice problem, however, that you might want to give some thought to as you look at these disciplinary proceedings, as to how to avoid the problem of members being judged after the fact with very stringent evidentiary rules and very serious sanctions judged against a standard that is perhaps ambiguous, maybe even vague. And we thought about that some in the early 1980s when we were looking at revising the Senate's ethics code and its procedures.

Thank you.

[The statement of Mr. Saxon is printed in the Appendix.]

Chairman HAMILTON. Thank you very much, Mr. Saxon. Thanks to each of you.

We will begin with Chairman Boren.

Chairman BOREN. Thank you very much, Mr. Chairman, and I apologize that I have had to be in and out this morning because of scheduling conflicts, which hopefully if we do our job, there will be fewer of those in the future.

I want to thank all the members of the panel for their very thoughtful comments. You have given us a lot of food for thought, and you have conveyed to us the kinds of tradeoffs that we have to deal with in trying to devise a system which will never be perfect, as you have all indicated, but perhaps hopefully better than the system we now have. It's very difficult.

I think even the conflict, it's not only difficult to judge a peer, but also the problem of even exonerating a peer. Because even if that person should be exonerated, I think very often members of the House or Senate will hesitate to exonerate their peers for fear that it will look like they have not really taken an independent and objective view.

I have found that once while chairing the Intelligence Committee on another matter, one of our colleagues had been accused of leaking classified information and had been subjected to an investigation at Congressional request by even the Executive Branch, Justice Department. We had evidence which cleared that member.

And yet, the Attorney General was reluctant to clear the member because he didn't want to look like he was playing favorites, and other colleagues in the Congress were reluctant to clear the member, and so it became in essence a difficult decision, but that's what we finally did. Because that's what the facts were, the person was not guilty, and entitled to have his name cleared. But it became difficult.

Let me ask this one question, and I don't want to take time from my colleagues on the committee. You have all talked about this balancing of the need for having people with a knowledge of the institution serving on any panel which would call perhaps for having, if we have an outside panel in any part of the process, some former members, so that at least someone is part of the process, who says, I know what it's like to deal in the atmosphere each day, I know what the pressures are that are exerted, I know what the schedules are like, I know how sometimes something might happen without your paying due attention to it, it wouldn't have been deliberate, whatever that factor is, against the need for objectivity and also the appearance of objectivity, to have public trust, that it's not just members of the old boy or old girl network, from the club and so on, judging their fellow members.

Let me just ask this. Two questions. A fair compromise on that might be to have whatever panel we had, if we have an outside panel or pool in part of the process, composed of some former members mixed with other citizens, but perhaps slightly less than a majority, somewhat less than a majority of the members of the panel being former members, but assuring that there would be some former member representation, and mixed representation, in other words, perhaps with former members being a slight minority anyway.

Second, would you limit the outside panel, both for constitutional and other reasons, to either the first part of the process, what we might call the grand jury or indictment process, which would save members time from going through whether or not this was a matter that should rise to the level of demanding members' time, or perhaps even the first two phases, the grand jury indictment phase, perhaps coupled with the finding of fact phase, stopping short of recommendations as to punishment.

It would seem to me that if you have an outside group which finds the facts and then also makes recommendations as to punishment, if that group has a great deal of credibility it becomes almost impossible then for the members of Congress themselves to second guess the recommendation of that outside panel as to the appropriate punishment, especially.

I just wonder if you would comment on those two, one, do you think a mix of former members and citizens would be good if we have an outside group striking that balance, and second, do you think the outside group should be limited to one or two phases of what we might call the finding of fact process as opposed to the recommendation of punishment process? Maybe each one of you could just very briefly comment on those two points.

Mr. THOMPSON. On the first point, I think I agree, Senator, with the suggestion. I think former members should be on the committee. I don't agree with some of the proposals which suggest that

only former members should serve. And I also think that you don't actually need a majority. A few former members, I think, would probably carry considerable weight. In fact, if anything, I suspect, and perhaps my colleague Mr. Rosenthal will comment on this, that the experience is in States that the former members tend to carry a great deal of weight in the proceedings. So you don't need too many of them.

I would also, on the question of membership, I think continuity is very important. So I am skeptical of some of the proposals that would have pools or random panels, random selection from a pool. I think the kind of knowledge that is built up by a committee is almost as important that the knowledge that former members bring.

On your second question, I would stop short of a recommendation. I would have the committee stop short of a recommendation partly for the reasons you suggest. I would, however, suggesting that finding of fact phase two ought to be part of their responsibility. I suspect there is some disagreement among my colleagues on that. Some people favor only the indictment phase.

Mr. BRUFF. I'm inclined to agree with both, also. The thing that strikes me about being on a purely independent board is I think if I were a member of that I would be thinking what I can't know is what I don't know. I won't have any way to educate myself about special things about the institution that a former member might be able to tell me in about 20 seconds. So I think there is an educative function there that can go on that's irreplaceable by anything else that I can think of.

On the second, I think I certainly would have them stop short of recommendations. I think that's your business to decide what to do about it. Whether or not to bring it all the way to fact conclusions, reasonable minds could disagree on that.

Mr. SAXON. I basically concur with what Professor Bruff said. I think some hybrid, Mr. Chairman, is called for. Because as I said, it's necessary for fact finders to understand the environment within which members operate. Second, I think that I would have them stop short of any recommendation also. That's your constitutional duty.

I would simply add one thing. You alluded to an investigation of classified information. Unless things have changed, at least on the Senate side, the ethics committee still is charged by resolution to investigate leaks, both from the intelligence committee and the foreign relations committee.

So whatever pool of, whether you have like a jury venery on the civil side where you draw your jury, or if you have some pool that these individuals are selected from, or you have a standing ongoing outside committee, they are going to have to have—you may want to have prospectively security clearances, so if there is a matter to be investigated of this nature, you don't lose time while they all get cleared.

Mr. ROSENTHAL. Senator Boren, let me add, in my experience watching mixed membership committees in State legislatures, I think that members or former members have great influence, primarily in educating laymen. I don't think it's necessary to have a majority of former members, or even a significant minority. It

really depends upon the character and qualification of the former members. A few could do the educative job, and then I think everybody would be up to snuff and understanding the institution and institutional life. So I think that is very important.

I think the appointment powers, if the appointment powers are with the Congressional leaders or the members of Congress, I think that you can fairly well assure that there will be a reasonable membership on the committee of lay and former members, public members and other members, and that would at least assure as fair a process, and a process that would be at least more credible with the public and the press. I say more because I'm not sure anything will be completely credible.

Senator COHEN. Senator Boren, would you just yield for a follow-up question on what you've asked? I will ask it as a rhetorical question, perhaps, but on the second part, if you have an independent commission which only engages in fact finding and does not deal with the recommendation as far as punishment, would there be a requirement that the members, either individually or collectively, would be prohibited from expressing any public opinion as to whether subsequent Congressional action was severe enough or not?

Because if you allow individual members of the Commission itself to make a statement, you thereby have defeated the whole purpose of having an independent commission. The cynicism would be there, it's a whitewash, we have made an investigation, you gave them a slap on the wrist, and nothing has changed.

So I would like, on my time, not on Senator Boren's time, perhaps for you to ponder that and give me an answer.

Chairman BOREN [presiding]. Okay, Senator Domenici, and then Mr. Spratt.

Senator DOMENICI. Thank you, Mr. Chairman.

Let me say to all four of you, I did not have a chance to read your testimony. But from I heard from you, I assure you I will. Because I believe, having heard your summaries of it, that you have some very constructive ideas and some very constructive information.

Let me ask, for those who are familiar historically with the creation of outside commissions, whatever their membership, and whether you want to include the very different and strained one in California or not, it doesn't matter, but I'm of the impression that after the winds calm down and you have this new outside group that the perception of these constituents in that State of their legislature has not improved very much.

So you go through all this because you want the public to have a perception that this policing is going to make members more honest, they are going to do their jobs better, they have all kinds of ideas on how much this is going to do for them. I wonder after you have them in place for a while, do the constituents or the media change their view of the effectiveness of ethics against members?

Mr. ROSENTHAL. If I could address that question, the answer, I think, is certainly not. You're quite right, Senator. I think the effect is a momentary effect. The issue is, what would have happened in Kentucky, for example, recently, which went through ethics reform special session, had it recommended that the legisla-

tive committees do the job instead of an independent commission? What would have happened is that they would have gotten trashed in the press.

But, having gone the commission route, I don't think that they are going to win any great editorial favor or any public favor for having done so. And the fact may be that the commission will bring up more issues and keep issues more in the spotlight than might otherwise happen. So I don't know that there are any long-term gains in that respect.

Senator DOMENICI. Would you all agree to that from what you know? So isn't it fair to say that all the testimony we've been hearing about let's change the perception so that the public will have more credibility in what we're doing, that that's talking about kind of what Representative Hansen was saying this morning, we need a hanging? The public wants a hanging, and the first hanging would be to totally change our system and put a new one in. You'd get a lot of great press about that.

But should we really be concerned about that if it's not going to work?

Mr. THOMPSON. Could I speak to that? I think we shouldn't, obviously, make changes just in order to satisfy unreasonable or distorted press accounts. That's right. And it probably is the case that doing the right thing will not necessarily procedurally be the right thing, necessarily win you as much favor as it should. That's a fact of political life.

But it does marginally, I don't think that one can point to great swings in public opinion polls to show this, but over a period of time, I have a certain amount of confidence that if one has the right sort of procedures in place which are not inherently beset with a conflict of interest problem, that reasonable members of the public, opinion leaders, colleagues in other institutions, will have more confidence in what you're doing. It won't win you lots of votes, it may actually increase to some extent the salience of ethics discussions. But if it is the right thing to do, it should be done.

Mr. BRUFF. If you change the system in a way that really does cause a bit more compliance and fewer complaints, then there will be more public confidence and you won't really attribute it to anything in particular, just the waters are calmer. By the same token, if you were to change just for the sake of change, it would be awfully hard to undo.

Senator DOMENICI. Well, Mr. Chairman, I don't—would you like to comment, Mr. Saxon?

Mr. SAXON. Very quickly, Senator, two thoughts. One, I think that it's bound to have some, perhaps minimal, maybe not quantifiable, but some effect if an educating function is also served by the members. I think as they each go back to their States, as you all do, and they are giving speeches, you are responding to media interviews, you can talk about the fact that the institution is sensitive to these issues and therefore you have tried to bring in some outside involvement to help make things more objective.

Second, I think that the institutions can do something that we saw in the early 1980s in terms of leadership, where you think the process is being abused. This is not quite the same question, but it goes to a question you asked of the earlier panelists.

We had an instance in the November 1980 election cycle in which we thought a politically motivated charge was filed with the Senate Ethics Committee. Back then, Senator Heflin, a Democrat, was chairman, Senator Wallop, a Republican, was Vice Chairman. Normally everything has to be done in tandem and letters go out under both signatures.

But the Republican part of a state from your neck of the woods filed what we thought was a frivolous complaint against an incumbent Democratic senator. At the committee meeting Senator Wallop turned to Senator Heflin and he said, I want to take this one. I am outraged that my party is using our process for partisan gain, and I want to send a letter back by myself. And he took out the niceties of the staff letter and put some real oomph into it, and sent back a letter——

Senator DOMENICI. Which he can do.

Mr. SAXON. —that said that this committee will not allow itself to be abused for partisan purposes. So part of it is an educating function, with whatever changes you announce.

Senator DOMENICI. Mr. Chairman, I particularly want to thank Mr. Bruff for his testimony. I will read it in more detail. But it seems to me that we ought to have some changes if they will cause this whole process to be better and more fair. But if it is motivated principally by changing the perception of the public, I truly believe that's very little gain when we want a Senate and a House to continue on for decades and centuries to do something for a little tiny bit of press that we are moving in the right direction.

Chairman HAMILTON [resuming Chair]. Thank you, Senator Domenici. Just so my colleagues will know, I have Mr. Spratt and Ms. Holmes Norton, Senator Sarbanes, Senator Cohen and Senator Reid, in that order.

Mr. Spratt?

Mr. SPRATT. Thank you, Mr. Chairman, and thank you for your excellent testimony, all of you. As I understand where we are now, you all agree that there ought to be a two-tiered structure of some kind, an inside panel and an outside panel, and a bifurcated process. We had a fairly spirited discussion yesterday at the end of our hearing on this same subject about how these two bodies would interface, interrelate.

And in particular, and this may go to Mr. Bruff, because I believe you have some experience in the Administrative Procedure Act under the ABA, we were discussing whether or not if the first panel did indeed make a findings of fact, there would be a right of appeal under the House rules or the Senate rules to the second panel, the inside panel.

And if so, would you have to show error, substantial error, or simply ask for a reconsideration de novo, a full rehash of all the facts? Could you give me your reaction to how you think the second tier, the inside tier, should interrelate to the first tier with respect to factual findings?

Mr. BRUFF. I haven't thought about it carefully, only to say for the moment that I was struck by the comment this morning that even if you separate the functions by bifurcating the committee, then you have permeability problems. Mr. Hansen was talking about that a bit.

The other side of that is if you cut off the permeability and separate them completely, either with an outside commission or an internal bifurcation of the committee, then you are inviting yourself to formalize the relationships between the two halves in just the sort of ways you just mentioned, all right going from stage one to stage two, no facts are to be reopened unless we meet some threshold criterion.

My instinct is not to favor quite so formalized a relationship. It's a question of who looks at the facts at what stages to me, with what judgment in mind. That is, a first group looking at the facts, trying to decide what they are, and whether any charge should go forward, a second one looking at them with the question of judging culpability and imposing sanctions. If it's different individuals, I'm not sure that you need formal burdens of proofs between the two. But we'll be glad to look at that for you.

Mr. SPRATT. Reaction from other members of the panel? Do you think honestly that if the panel just made findings of fact, that it could resist making recommendations as well, either formally or informally? Formally it seems to me that it would evolve eventually to making recommendations, and informally it would seem that the members of the panel one way or another could not restrain from expressing themselves as to what should be done, if they sat through the elaborate, time-consuming, fact finding process, they would certainly have an opinion at the outcome of it as to what action the Congress should take. It would be hard to pull that punch at the very end. Wouldn't you agree with that?

Mr. BRUFF. I think that tension is natural to the system. I can hardly see a fact finder concluding, now, the defendant is guilty of first-degree murder in the most heinous case we've seen, but who knows what penalties should attend this?" If they don't have any formal recommendation function, it may be that a little spin will get put on facts. Maybe it's best to let them express themselves, I don't know.

Mr. SPRATT. So what you're saying then is that the panel could indeed characterize it, they could come to the conclusion that this is a violation of rule such and such, a legal conclusion is distinguished from a factual conclusion. They just wouldn't decide the penalty that attends that particular violation.

Mr. BRUFF. One question there would be whether you would them to characterize how frequent this kind of misbehavior is, which often is a subject of press controversy. Again, I don't know how best to do that, but that's one kind of thing that a finding might consist of.

Mr. SPRATT. Professor Thompson, I think you were about to speak.

Mr. THOMPSON. Just to emphasize something that I think Senator Cohen was getting at earlier, it matters, it seems to me, less important to separate exactly whether it's fact-finding or legal conclusion than that the commission or body speak only as a body in official documents. I would hope, perhaps this should even be done by law, that the commission would not, like a jury, the members would not be free to speak on their own out in public. I would see this as almost like a judicial body, not like a jury in that sense

with citizens free to go to talk to the press about their own personal opinions after they had decided the case.

That would be some protection, that is the commission or the body would have to agree collectively in writing. And that seems to me to be very important. If that were taken care of, it wouldn't matter quite so much where you drew the line on fact finding or findings of violation.

Mr. SPRATT. We've been focusing mainly on a model that assumes we've got a trial before it's a serious violation, and the question is, how do you adjudicate it, inside or outside body. But I haven't been on the Ethics Committee, my understanding is the bulk of their business is not sitting in trial on certain violations, but in issuing ethical guidelines and advice. Do you think it's necessary to have an outside body to render periodic advice to members who need ethical guidance? As I see, the California situation has evolved into that, where members go to this particular whatever it is, FPPC, and get ethical guidance from them as opposed to going to their inside ethics committee.

Mr. ROSENTHAL. Can I address that? They do both. They have inside committees and the FPPC. The FPPC is involved with enforcing many of the ethics laws that were enacted by the legislature and in promulgating regulations. So they are the enforcer, the administrator, of ethics legislation. So they are the final determiner of whether something is right or wrong or legal or illegal according to law.

But normally, members go initially to their legislative counsel, to their ethics committee, and the legislative counsel or ethics committee then may check with the FPPC if it's an ambiguous situation. So FPPC remains the final authority. And I think this would be true of other ethics commissions that have that kind of administrative enforcement power.

Mr. SPRATT. So if someone disagrees with an ethical guideline that a particular member seeks and obtains, that outside party or inside party can take it up to the commission? Let's say that I go before the committee and ask for advice as to whether or not I can file a particular piece of legislation in which I have an interest, it affects me personally.

And I seek the guidance from the ethics committee so that I can get advice fairly expeditiously, I want to file the legislation. I'm speaking to a personal set of circumstances. And they give me a letter saying I can. Is that then challengeable by someone outside the body or inside the body and appealable to this outside panel?

Mr. ROSENTHAL. I don't know in that particular case. I think that issue in California would be for the legislature to decide, and they would make the final determination. However, if you wanted to take a trip at the expense of some outside group, it would be finally the determination of FPPC. So it varies, and it is also very confusing. Certainly the public doesn't understand and members don't understand it.

Mr. SAXON. Congressman, if I could address that for a second, I think the traditional function that the in-house staff performs to advise and counsel members and their staffers and the public is one that should be continued. And I would not recommend any outside panel to do that sort of day to day deciding, even to the point

when it results in some formal interpretive ruling or advisory opinion. I think that's something that can be done in-house.

As to whether that security blanket, if you will, that you get from the committee can be challenged, it certainly could, by some challenger in the political context, just as any other act you engage in could be challenged. But our view on the Senate side was always that if someone came, it rose to the level of them seeking an opinion from us and we gave them that opinion, they were entitled to rely on it, that doesn't preclude someone challenging them, but it gives them a greater degree of comfort.

Mr. SPRATT. Thank you very much for your testimony.

Chairman HAMILTON. Ms. Holmes Norton?

Ms. NORTON. Thank you very much, Mr. Chairman, and I want to thank these witnesses for testimony that I have found to be both thoughtful and useful.

It strikes me that wherever the committee comes out on the question of ethics, it will need a convincing rationale, and that ironically it will be easier, given the mood of the public, to come up with a convincing rationale for changing the system than for keeping the system the same or similar to the way it is. And that is not always—that doesn't have a lot to do with misconduct on the part of members. Indeed, whatever system we set up will, I predict, be called into question the first time some member comes before the body for misconduct. It will then be seen as a criticism of the member to be sure, but criticism of the system, and people will begin to talk again about the system and how inadequate it is.

It strikes me that our major problem is that Americans have—we have a consensus in this country about what a fair system is. It comes from living in a country where there is an adversarial due process system, so that it is counter-intuitive for most Americans to observe the notion that there ought to be people who live under another system, another kind of system.

This kind of system is generally tolerated on the basis that the group involved has very specialized knowledge. That's why we tolerate it for lawyers and we tolerate it for doctors, and there is considerable controversy as to whether we ought to tolerate it for them, and there are in some instances mixed systems, for example, for lawyers.

I want to ask you if you believe that legislators in fact are like doctors and lawyers, can one make the American people believe that the reason we need a system of peer review or self review is because of the reason everybody else who has it needs it, because there is sufficient specialization in the knowledge involved so that a break from the normal consensus notion of due process in a society is warranted here.

Mr. ROSENTHAL. I'll go first. I am a great admirer of the legislative bodies, and I have been studying State legislatures for practically all my adult life. I am a legislative groupie, as a matter of fact.

And yet I have come around to the belief that legislatures cannot and should not make the determinations on their conduct. I understand that it is more functional in many ways for them to do so. But I think the institution is changing and has to change. I think our society has been changing in major ways. And I think the

boundaries between the institution and the public in this society that were pretty sharp, for so many years, for legislatures or for the medical profession or the legal profession, are becoming blurred. And I think this is almost irresistible. That's what has become my belief.

But even though I don't believe that the legislature immediately or in the short run can make great gains in public confidence by doing so, I think it is essentially the right thing to do, and I think over the long run and in some un-understandable way, the institution will be better able to cope for it.

Ms. NORTON. My concern is that I'm led to believe that the reason we have peer review in legislators is because legislators were the source of law, and there was no body, no natural party above them to review and therefore, that is one of the reasons this rationale has generally not been convincing to the public, and that it really didn't rest on the same basis that self-regulation rested for lawyers and doctors. It just rested because there was no natural—it landed with them because there was no natural party to review them. And therefore people have no confidence, essentially, in the way they review themselves.

Mr. BRUFF. A couple of thoughts, Ms. Norton. One is, I think the process by which the ethics committees make their final determinations is in need of a very good second look, especially with regard to fairness to the people involved in it. And our committee intends to look at that from the viewpoint of experienced administrative lawyers and see what we can suggest.

The other is the question of public confidence, just to stress that there are two possible components in a loss of public confidence for the institution. One is the old self-regulation question of whether people are being cleared although they have sinned. In part, that's irremediable.

The other one is the nature of the sins. It seems to me that one element in the loss of public confidence is that the public doesn't necessarily share Congressional mores on what kinds of behavior is acceptable. If that's true, whether or not a person is found to have sinned, just revelation of the conduct will cause unhappiness among the public.

So what I'm suggesting is that you revisit not only the structures, but also your governing rules of behavior, to see where they are out of sync with the public's understanding of what you ought to do. Sometimes you may not be able to close that gap. But there may be places where you ought to.

Mr. THOMPSON. If I could just address the specific part of your question regarding the other professions, I think one of the things that's been happening in this country in recent years is that all of the professions are under attack for not adequately enforcing their ethics through processes of self-regulation.

One of the things I tried to point in my prepared testimony was that self-regulation is, the success of it and the existence of it on a lot of different professions has become more of a myth than a reality. Law, as you yourself said, is more of a mixed system now that self-regulating one. And even professions like the academic profession or the clergy, which used to be the latter sacred, have come under attack for the same reasons.

So it's not just that everybody is becoming suddenly suspicious of the claims of legislators to regulate themselves. I think all people who hold positions of authority or power in our society, or privilege, people who have special knowledge, are being called to account. And actually, that's not such a bad thing.

Ms. NORTON. One more question, if I might, Mr. Chairman. I'd like to know if you can cite any precedent for the notion put forward that the outside body might stop short of a recommendation. I see some awkwardness there. I don't agree that there is necessarily a constitutional issue in having a recommendation which you then act on.

In fact, one might argue just the opposite. Somebody makes the facts, another body decides the punishment. The body who decides the punishment had heard no testimony, apparently is doing so entirely on the record and has no guidance from those who indeed saw the witnesses, heard them, as to how they would come out. And the reason I don't see the constitutional problem is because you can recommend and still have the same record before you that you would have without the recommendation to decide as a body what the punishment should be.

If anything, I think one might be walking into the lion's den as far as the public is concerned in that way, because the busy members of Congress are seen as coming in to let their colleagues off the kind of punishment that they might have gotten had a recommendation been allowed in the normal course. I'd like to know if there is any precedent for it, and whether you see any problems that might turn in upon us if we were to adopt so bifurcated a notion.

Mr. SAXON. Let me address one aspect of that, and that is, that when I talk about an outside panel, however comprised, maybe I should have made this clearer, my concept would be that there would be some showing that they come in and make after they have found their facts. Whether they, like a jury choosing a foreman, choose a chairman, or whether they do it in concert with special counsel, my notion is that at some point, the members of the House or the Senate who are to do the meting out of the sanction or the recommendation to the full body, would hear a presentation of the facts as found. It wouldn't simply be that they would bind up the depositions and the affidavits and then come——

Ms. NORTON. So they hear orally a presentation of the facts instead of reading a presentation of the facts. What good is that? I'm still left with my question. They are not the ones that heard the evidence. All they did was to hear the rendition of somebody else as to what the facts were.

Mr. SAXON. That's what they're essentially hearing now in the hearings that are held. It's just that they have not also been involved at the earlier stages hearing on a daily basis, a witness by witness basis, what the fact finders, the staff, are finding.

Ms. NORTON. What's the harm of a recommendation?

Mr. SAXON. I'm not sure there is any harm. It may create some political problems, as has already been alluded to, with the members if they chose to override it. There probably would not be such problems if they stiffened the sanction. But if for some reason they

saw fit—it may be appropriate on the facts to weaken the sanction that might subject them to further criticism.

Chairman HAMILTON. Senator Sarbanes?

Senator SARBANES. Thank you very much, Mr. Chairman.

Actually, just on that last question, it seems to me if you have a recommendation, you have pretty well determined the outcome as a practical matter. So I think if you go down that path, you simply ought to recognize that that's going to be the practical consequence.

I think it would take an extraordinary set of circumstances to depart from the recommendation, particularly to depart in a more lenient direction from the recommendation, and given everything that's assumed about the body inside, I guess it's not very likely they would depart from it in a more stringent direction. So I think the recommendation pretty well ends up determining the judgment. Maybe that's where we want to go, although some do raise constitutional questions about that.

I want to thank the panel. I think it's been a very helpful panel. I really want to divert off into a question that is somewhat unrelated, but you all have watched the functioning of these ethics questions in a lot of legislative bodies, and I know particularly Alan Rosenthal is an old friend of mine, I've followed him closely over the years, he actually helped to reform the Maryland legislature back in the late 1960s in a very positive direction, I must say. Although we don't put on him the burden of responsibility for everything that has happened since that time.

I'm interested in what your perception is about how effectively these commissions or other internal bodies that deal with these questions are in educating the membership as to what the rules and standards are and how much benefit there might be derived if you really mounted a very thorough and comprehensive educational effort, almost the equivalent of requiring members to go through a course, through a set of briefings and maybe even some kind of, I don't know that I want to take it to the point of examinations and answering and so forth. But some sense, because you have all this kind of floating around.

Is there any place that you see in the country in a legislative body where you say "Well, now, they really do an extremely effective job in this particular place in educating their members on these ethics questions. They sensitize them to them early, they lay out a lot of practical examples in order to give them a real feel for the standard, they come down very hard on certain kinds of behavior that they think are maybe being engaged in that are brought to the attention of the ethics body would clearly be ruled out of order, and they really push their members to a higher level through an education process. Does that go on anywhere that you know of?

Mr. ROSENTHAL. Senator, I'm searching for that State. But the answer to my knowledge is no. And it's no because as you people well realize, you're busy, you're pulled in so many different directions. One of your major issues now is to reduce the number of committees so you don't have to serve on 18 committees and subcommittees in the United States Senate.

Out in the States to a lesser extent, legislators have so many competing responsibilities, survival being among them, that they

don't have time or energy for this. None of the members, including the leaders, feels that they want to, or to my knowledge, that they want to confront members and say, and I've been asking this question to a lot of leaders and members, "Do you know who is at risk in your legislative body who might have to be reigned in? Do you have any idea?"

Well, the answer there is, we don't know. These bodies are not as collegial as they once were. So to a large extent, they don't know who is getting in trouble or who is doing what. In those cases where they have a suspicion they will respond to me, well, we don't have any evidence. In those cases where they have a strong suspicion, it is not the mode of many of these legislators or legislative leaders to be confrontational. They need the members' votes.

So the informal process doesn't work terribly well to my knowledge. Now, the formal education process is tried in a few States. In California, there is a statute now that requires biennial ethics training for the membership. And that was enacted in 1990. And they have gone through two training sessions where the members and staff and lobbyists in the State have got to undergo ethics training.

I happened to do the training for the California Senate about a month ago. Michael Josephson, an ethicist in California, did it 2 years ago. It was the toughest gig I've ever had. And I understand it, these people don't want to sit around and be trained in ethics. Their reaction is, well, I'm ethical. Or the reaction is well, you can't learn ethics. That's something you learn at your mother's knee. All of my ethics, as Congressman Pike said, I learned in kindergarten.

So it is difficult to get them in those kinds of discussions. I think it helps, and I think in California members do benefit as a result. But they don't do it willingly. It is very difficult to find the time and the inclination for that kind of educational campaign.

Senator SARBANES. But you think that requirement and those sessions are helpful and positive?

Mr. ROSENTHAL. I think it's helpful, I think it's useful, and I think over time it will have an impact. And this is training not only in the laws and regulations that they are required to follow, which are complex and confusing and provide a lot of opportunity to screw up, but it's also training in the more ambiguous areas of ethics where there is not law, but there are just things that you do or you don't do because they are right or wrong or because they will bring discredit, whatever that is, on the institution.

So I think both of those areas are important for members. And I think in the long run they will be helpful. I think it should be a normal part of what legislators do by way of in-service education.

Mr. SAXON. Senator Sarbanes, if I might, two points on that point. One, I understand Senator Heflin was here earlier in the week, at which time he suggested that he might favor some sort of mandatory ethics education. I think that might not be as difficult as it sounds to swallow. There might be merit to it both because it would sensitize the members to things but also because it would give them a better educational foundation for what the rules are. My experience dealing with mostly with staffers but sometimes

members in three and a half years of trying to interpret the Senate ethics code is there is a lot of ignorance out there as to what's in it.

And the second point, I would draw a parallel to the legal profession. No lawyer I know is excited about committing an ethics infraction and perhaps jeopardizing his or her license. But I just ended a term as chairman of the professional ethics committee of the Birmingham Bar Association. We have a new Alabama set of rules of professional conduct, and the Birmingham Bar Association decided to have mandatory ethics education at the beginning of every substantive seminar.

So you go to a seminar or bankruptcy or civil procedure, and you get 15 minutes of ethics presentation. And I did most of those, and many people in the audience, a year after we had our new code, were not aware we had a new code. So I give you that parallel simply to say don't presuppose that all of your colleagues are fully conversant with what's in the code of official conduct.

Senator SARBANES. I don't presuppose. I favor mandatory training of some sort. I think we need it, and we need to put a lot of careful thought and get some real professionals to put the program together and how to present it and so forth and so on. Because there is none of that now. You may seek to self-educate yourself. But you can't bring to that the sort of perspective that people who work in the field can come in and give to you, at least it seems to me.

Mr. THOMPSON. Could I address that, Senator? I agree with you completely. I think even though there are obstacles, Alan mercifully spared—he and I addressed the Connecticut State legislature, so to speak. They also require not training for members but a session of some sort on ethics.

I think three or four members showed up when Alan and I spoke. I think maybe four for Alan and one or two for me. So he had a better turnout. But there were a lot of lobbyists there, and the press was there. It wasn't, I think, totally useless. But it does show you what one is up against.

Two other brief points. One, I think often that one of the most valuable functions of this kind of training is not so much to inform people, though I think that's important about what the rules are, but to legitimize, make respectable, discussion of ethical issues in informal ways. So it raises peoples' consciousness about the subject, makes it easier to talk to one's colleagues informally later. And that does seem to be a good effect of it, an educative effect that occurs in business corporations which are now doing this, there was a lot of skepticism there, but now major corporations are having ethics training for their executives, hospitals, it's happening in other places.

And the one last point I would make. The Office of Government Ethics in the Executive Branch just in the last few years, as you are no doubt aware, has mounted really quite a massive educational program. And I have looked at it, not in detail, but my impression is that it's quite successful, there was a lot of skepticism there initially as they go out into the executive agencies.

But with the use of the right kinds of case studies and with people who are sympathetic to the problems are not coming in and sort of lecturing but are trying to help people work through these,

this has been very effective. Now, I realize the Executive Branch is a different situation. But some of the same problems there were existent and have been overcome.

Senator SARBANES. Thank you very much.

Chairman HAMILTON. Okay, Senator Reid.

Senator REID. Mr. Chairman, I am an example of why this committee needs to function. I have been at hearings all morning that I have had to chair. So I have only been here for about 45 minutes and have no questions.

Chairman HAMILTON. Okay. Any further comments from my colleagues?

Might I say to you we appreciate very, very much your testimony. It's been a very good morning, and I'm afraid, afternoon as well, here.

Thank you very much. We stand adjourned.

[Whereupon, at 1:06 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

LOUIS STOKES
11TH DISTRICT, OHIO

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STATEMENT OF THE HONORABLE LOUIS STOKES

before the

JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS

February 25, 1993

Mr. Chairman, and Members of the Committee, it is a pleasure to be here today to participate in these historic hearings.

I believe it was Jefferson who is alleged to have said that the tree of liberty must be pruned by a revolution every now and then. Similarly, and, I assume, peacefully, it is desirable for the Congress of the United States to be subjected to periodic self-examination to insure that it remains the servant of that liberty to which Jefferson referred. Clearly, as we head into the 21st century, changes are in order; I trust that they will be based on informed deliberations and will stem not from an urge to make changes for the sake of change, but from a desire to improve our product.

You have asked Jim Hansen and I to discuss the current enforcement procedures of the House Committee on Standards of Official Conduct, the Ethics Committee. As you know, I served as Chairman of the Committee from 1981 to 1985, and

again during the last Congress when Jim was the Ranking Republican Member. The current occupants of these positions are Jim McDermott of Washington and Fred Grandy of Iowa.

I would also note that Jim Hansen and I together have served on the Committee at various times for almost 20 years. I prefer not to speculate on what that indicates about our ability to say no.

The current enforcement procedures have been in place since the beginning of the last Congress. They were recommended by the 10 Member House Bipartisan Task Force on Ethics appointed by the Speaker and the Minority Leader in February 1989. The Task Force, over a ten month period, undertook an extensive review of ethics rules and procedures.

It conducted private interviews with over 30 Members of Congress. In addition, over 24 Members, academicians, and journalists testified during four days of public hearings.

The principal areas addressed by the Bipartisan Task Force, which was co-chaired by Representatives Vic Fazio and Lynn Martin, were (1) acceptance of gifts; (2) honoraria and outside earned income; (3) financial disclosure; (4) use of official resources; and (5) ethics committee procedures.

I was a member of the Task Force and was one of two Members assigned to the subgroup on ethics committee procedures.

At that time, the primary criticism of the Ethics Committee

was not that it dealt too leniently with Members, but quite the opposite - that it's procedures were unfair. Specifically, most of the Task Force testimony emphasized the lack of due process inherent in a system where the same group charged with determining if there was sufficient cause to bring charges, also decided if the charges were proved, and recommended the appropriate punishment. Essentially, the grand jury, the petit jury, and the judge were one and the same.

This criticism led to the bifurcated system in force today, which I will now summarize.

When a complaint is properly filed with the Committee, the Committee must meet and decide, by a Majority vote of its 14 Members - 7 Democrats and 7 Republicans - whether the

Members - 7 Democrats and 7 Republicans - whether the complaint "merits further inquiry." If it does then the Chair and the Ranking Minority Member appoint a four or six person investigative subcommittee, equally divided between parties, to undertake a Preliminary Inquiry to determine if there is "reason to believe" that a violation of the Rules of the House or other applicable standard of conduct has occurred. The Chair and Ranking Minority Member cannot serve as voting Members of the investigative subcommittee.

If the investigative subcommittee concludes there is reason to believe a violation has occurred, it issues a Statement of Alleged Violation. The Chair and Ranking Minority Member then designate the remaining 8 or 10 Members of the Committee, as the case may be, to serve on the adjudicative

subcommittee which must determine if the charges have been proved by "clear and convincing evidence." If so proved, the full Committee reassembles to determine what sanction to recommend to the House.

I believe this system is sound. It goes a long way toward removing the bias thought to exist in the old system, while retaining the internal enforcement mechanism. In addition, it lessens the time all Members must spend on a case, while ensuring that a sufficiently large number of Members is involved in the decision-making process. Finally, coupled with an increase of committee Membership from 12 to 14 and a 6 year limit on service, it insures that the burden and the power of ethics committee service are shared among House members.

While, as I stated, this process seems to be sound, I must point out that it has yet to be tried. That is, during the 102d Congress, very few complaints were filed with the Committee and none necessitated use of the process I just described.

In any event, as far as the House is concerned, I am troubled by calls for further procedural reforms which are based on the notion that the Ethics Committee has not done its job or has not done it properly. During the six Congresses which preceded the advent of the current process, the Committee considered 29 complaints against Members of the House. As a result of these cases, one Member was expelled from the House, four Members were censured, three Members were reprimanded, and two Letters of Reproval were issued by the Committee. In addition, nine Members, including a Speaker,

resigned from the House before the Committee could complete action on their cases.

This enforcement record was not, in the main, accompanied by adverse publicity, nor does it indicate a House unable or unwilling to discipline its own Members when necessary. Therefore, I am not persuaded that calls for a radical restructuring of ethics enforcement procedures have any basis in the record.

I am particularly troubled by proposals to shift some of the Congress's constitutional enforcement responsibilities to outsiders, whether they be former Members or former judges.

First of all, I believe that to the extent possible charges of

wrongdoing should be dealt with by the judicial process, and by the voters. Where particular conduct adversely effects the Congress, or violates internal rules, then the Ethics Committees should act. The best judges of both are sitting Members, both in terms of knowledge and in terms of accountability.

And the basic problem with these proposals is accountability. Why would an outside group - not accountable to other Members or to the voters - do a better job of deciding hard cases or of convincing the public of the wisdom of their decisions?

Finally, Mr. Chairman, let me comment on two issues reviewed by the Bipartisan Task Force on Ethics. The Task Force considered proposals for an independent investigative

office or special prosecutor for Congress, but rejected them on the grounds that such mechanisms ignore the basic responsibility of the Congress under the Constitution to discipline its own Members.

The Task Force also considered drawing on sitting Members by lot from outside the Ethics Committee to either conduct investigations or decide whether charges have been proved. While these proposals were ultimately rejected because of perceived practical problems, I believe there may be some merit in the latter - that is, in randomly selecting current Members not on the Ethics Committee to decide whether charges preferred by the Committee have been proved.

If the current House procedures, which are new and which

have not been tested, are to be changed, and it is not clear that the foundation has been laid for doing so, I would move in this direction. It further separates the grand jury from the petit jury, thus insuring more impartial deliberations, while responding to the perception that the Ethics Committees are designed solely to protect Members. In addition, the enormous burdens on the time of the permanent ethics Committee Members would be reduced.

Thank you Mr. Chairman. I will now turn to my friend, Jim Hansen.

Statement Before the Joint Committee on the Organization of Congress
February 25, 1993

Harold H. Bruff
Rothschild Research Professor of Law
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and
Chair, Congressional Process Committee, American Bar Association

As Chair of the American Bar Association's new Committee on Congressional Process, I am pleased to appear before the Joint Committee. Our charter is to study those aspects of Congressional process for which administrative lawyers may have useful insights, and to offer our recommendations first to the ABA and then to Congress and the public. Our committee has met, but has not yet taken any positions, nor has it obtained the consent of the Administrative Law and Regulatory Practice Section or of the ABA to any positions. Therefore I must speak mostly for myself today. My goal, though, is to open a dialogue between your own Joint Committee, with its broad charter, and our ABA group, with its more restricted one. Today I will discuss issues surrounding Congressional self-regulation that our committee intends to study. My hope is that the concerns and insights of the Members and staff of the Joint Committee will educate us, making our eventual product as useful as possible to the ABA, Congress, and the American people.

Under Article I, section 5 of the Constitution, Congress has

the responsibility to judge and punish the misconduct of its Members. Congress is probably free to structure its standards and processes for self-regulation largely as it thinks best, as long as it retains the final decision to sanction a Member. The Supreme Court's recent decision in *Nixon v. United States*, 113 S.Ct. 732 (1993), holding nonjusticiable a challenge to Senate Rule XI on impeachment procedures, suggests strongly that Congressional disciplinary procedures are not subject to judicial review. What Congress *should* responsibly do within its zone of exclusive power is, of course, another matter.

I. Problems Inherent in Congressional Self-Regulation.

Some of the problems inherent in Congressional self-regulation are also found in institutions for disciplining the professions, for example lawyers. (See Report of the ABA Commission on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century (1992)). Other problems reflect the uniqueness of Congress as an institution. For both kinds of problems, proposed changes in the standards or processes for regulating Congress most often present tradeoffs of one disadvantage for another; unalloyed gains are hard to identify.

Most broadly, any system for self-regulation incorporates values of collegial empathy and professional solidarity that present both benefits and costs. The advantages lie in an

assurance that those who judge will possess a full understanding of the issues and degrees of culpability involved in particular cases. The disadvantages lie in the disagreeability of judging one's peers and, most important, in limiting the amount of public confidence that the process can generate. As long as the ultimate disciplinary decision is kept in-house, these tradeoffs remain, but their mix can vary, as I note below.

Self-discipline in bodies as small as the Houses of Congress, and especially the Senate, can create outright conflicts of interest. The present or future support of fellow Members is needed for a myriad of bills and other matters. It is hard for anyone to lay these daily concerns to one side when judging a colleague. The ties or strains of party politics only increase the conflicts. To these inherent conflicts in Congressional self-discipline must be added special functional conflicts due to the historic role of members of the Ethics Committees as both investigators and judges of their colleagues. Administrative lawyers know this problem as combination of functions; agencies often use separation of function techniques to ameliorate it, as has the House of Representatives with its new bifurcation of the committee's responsibilities.

Professional self-regulation presents the person judging with the dilemma that an acquittal or lenient sentence seems a whitewash and automatically erodes public confidence in the

process, while a severe sentence threatens loss of collegial respect resulting from perceptions of undue harshness. In the particular situation of Congress, the actual imposition of sanctions has been rare, which suggests to some observers that the process is toothless. This conclusion does not take account, however, of the special role of disclosure as a sanction in electoral politics. If the disciplinary process can reliably expose questionable conduct, the importance of having sanctions imposed by Congress diminishes as the public assumes the ultimate role of judging its servants.

Finally, Congressional self-discipline has a unique cost in absorbing potentially substantial amounts of Congress' scarcest resource: the time of its Members. Substantive rules for Congressional behavior must not create such a maze that the Members spend copious amounts of time deciding how to behave; procedures must deflect burdens onto others as much as possible.

With these general considerations in mind, I turn to more specific issues surrounding substantive rules and processes for Congressional discipline.

II. Standards for Congressional Behavior.

Administrative lawyers would start with the proposition that it is always necessary to adapt rules for conduct to the nature

of the institution in which affected persons serve. Of course, the existing ethics codes in the Rules of the Houses attempt to do just that. On the supposition that these rules will be revisited, as they have been periodically, I have some observations to make.

The broadest question in crafting rules for regulating a unique institution like Congress is: how much should they reflect and codify the existing mores of the inhabitants, and how much should they seek to modify existing behavior? Legal rules are typically some mix of codifications of present norms with aspirational attempts to elevate those norms. Congress faces a particularly difficult problem here, because "insider" perceptions of appropriate behavior among the Members may not square with public perceptions of virtue. For example, new Senate Rule XLIII and the similar House Advisory Opinion No. 1 both thoughtfully address the sensitive problem of linkage between campaign contributions and constitutent service. To this reader, they appear to express a judgment shared widely in Congress, that a Member not only *should* perform constituent service without regard to whether the requester is a contributor, but that a Member actually *can* divorce the two matters in practice. Press reports in the wake of the "Keating affair" strongly suggest that the public does not share this judgment. Our committee is planning to analyze consituent service relationships with the agencies. I do not mean to take any position on it now; my point

is only that in revisiting its own code of behavior, Congress needs to find a way to look at its rules with some detachment, if it is not to create a disconnect between its own notions of propriety and those of the public.

One means of obtaining an "outside" perspective on rules is in operation with the Senate Task Force that is canvassing the statutes that govern other institutions of government or the people, to see whether they should be extended to Congress. Obviously, many of these statutes partially duplicate kinds of strictures Congress already applies to itself via the Rules. Still, the exercise should be illuminating, because it focuses the attention on what is special about Congress for purposes of particular areas of law. Preliminarily, the initial list of statutes in the resolution creating the Task Force looks appropriate--conflicts,prohibitions, open government laws, labor laws. If others occur to our committee, we will suggest them to you.

Of course, the overall purpose of our ABA committee's existence is to provide you one such "outside" perspective. (Our composition, including former Members and staff as well as those from other backgrounds, is an attempt to find a good outside/inside mix.) The ABA's Government Standards Committee also has a number of specific draft recommendations that set out ethical criteria for Members and staff. We will consider them in

our deliberations, and urge you to do so as well.

In general, Congress is certainly not short of advice these days. Many of the suggestions may be as instructive to you for what they reveal about divergences between inside and outside perspectives of the institution as they are for the wisdom they may contain.

One final point about crafting rules for Congressional behavior: it is important to try to forestall problems that can readily be anticipated, instead of trying to clean up frequent messes through punitive procedures. Reflection on the kinds of allegations of misconduct that have most often surfaced in recent years may identify areas where preventive rules are best. Also, there may be an especially valuable role for changes in Congressional processes other than the disciplinary ones themselves, wherever it seems that opening behavior to public view will both increase the likelihood that appropriate behavior occurs and enhance public acceptance of the process.

III. Processes for Regulating Congress.

One disadvantage of the current ethics committees is that they consume the scarce time of the Members themselves. This problem will only intensify if the rules for behavior multiply.

To some extent, it may be possible to displace both the burdens and the impact of regulation onto support organizations rather than the Members themselves. Thus, entities such as the new House Administrator can be used to channel inquiries into the appropriate part of the Congressional process. Some complaints, such as pay matters, can receive bureaucratic resolution; some pertain to elections practices and should be shunted to the FEC; some should go to the Ethics Committees. The offices of fair employment practices in both Houses may provide useful models of process for various kinds of issues, with modifications as needed.

Recent experience has produced a blizzard of proposals that the Ethics Committees be reformed. Our committee will study the issues; today I note some of the tradeoffs. The simplest proposals for structural change are those to bifurcate the committees so that one group of members investigates and another forms adjudicative judgments. This has the virtue of avoiding both the appearance and the reality of some conflict between the investigating and judging functions. It leaves the entire process in the hands of the Members themselves, with benefits in concentrated responsibility and knowledgeability and costs in time and public perception of a "club."

Other structural proposals include varying amounts of contributions by outsiders. All of these promise time savings for

current Members and some gains in public perceptions of objectivity; all of them threaten diminished expertise and attenuated Congressional responsibility. Proposals to use former Members for the investigatory and recommending functions are designed to relieve the committees of the timetaking early stages of these inquiries and to place the preliminary investigations in the hands of those persons who are most knowledgeable about Congress, but who are free of the conflicts inherent in the task of judging current colleagues. Such a body might be able to clear members of allegations of misconduct in a way the public would accept, although critics would protest that solidarity survives retirement.

Other proposals have suggested using senior judges, private citizens, or some mix of these outsiders among themselves or with current Members. The ideal calibration of a new committee's composition is probably a matter of speculation. At least the tradeoffs are clearly visible.

Matters of disciplinary process are also important, and our committee will look at them. Issues of efficiency and fairness surround use of independent counsels by the committees, streamlining of the investigatory process, the availability of discovery to the respondent, the timing and nature of public disclosures, and appropriate "trial process."

A separate means for policing Congress is criminal enforcement by executive branch or independent prosecutors. Although most Congressional disciplinary proceedings do not involve a serious prospect of criminal prosecution, the internal processes of Congress need to adapt to that possibility where it does exist. Also, if the independent counsel statute is revived, perhaps it should be extended to Congress, as some have suggested. Here Congress could explore lessons from the House bank investigation by the Special Counsel.

Concentration on such prominent issues as the restructuring of the Ethics Committees should not, however, obscure the fact that disciplinary investigations are, and should remain, extraordinary events in the life of Congress. Some of the most creative thinking about self-discipline could focus on ways to avoid having to resort to this ultimate sanction. Our goals are clear enough-- actual compliance with the rules laid down and public confidence that violations are not occurring. We might best pursue them by such prosaic means as drafting clear rules about permissible conduct, providing ready advice about their application, opening some aspects of Congressional process to public inspection, and structuring informal processes to resolve the less serious cases short of full Ethics Committee action. Our committee will be exploring these avenues; we hope to do so with you.

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Testimony on Independent Ethics Commission
before the
Joint Committee on the Organization of Congress
February 25, 1993

I am not exaggerating--not much at any rate--in maintaining that American state legislatures are currently undergoing a crisis in ethics. Legislatures in most of the states have been challenged recently, from within and from without, to enact ethics reform legislation and raise the standards of member behavior. In my opinion, legislatures and legislators generally are being unfairly accused. Their ethical behavior is better today than it was in the 1960s, but public expectations and standards have risen markedly and press scrutiny has intensified. Legislatures cannot seem to catch up.

Furthermore, there are instances almost everywhere of corruption and lesser abuse. In the past few years legislators have been indicted and convicted as a result of stings in California, South Carolina, Arizona, and Kentucky. Other scandals have shaken legislatures in Florida, Texas, Tennessee, and even in Wisconsin, a squeaky clean state with stringent ethics laws. When one or a few legislators stray, their colleagues and their institutions also suffer in the opinions of the public.

During the past decade or two, the volume of ethics legislation has been large. Some legislatures, such as Wisconsin's, have initiated reforms on their own. Some, such as California's, have accepted initiatives adopted in popular referendums. Still others have been forced to legislative action by the response of the press and public to either major or minor scandals. South Carolina, Arizona, and Kentucky are examples of the former. New Jersey and Washington are examples of the latter.

Recent legislative activity in the field of ethics has focused on the following areas:

(1) More inclusive and stringent disclosure requirements for lobbyists, including the entertaining of legislators.

(2) Limits on gifts that can be accepted by legislators from lobbyists including travel, and the prohibition of honoraria.

(3) Revolving-door rules that prevent legislators from lobbying for one or two years after leaving office.

(4) Stronger financial conflict-of-interest restrictions, including more detailed reporting.

(5) Limitations on campaign finance, including contribution caps, limits on funds from PACs, and further disclosure.

What I shall focus on here are not the substantive issues addressed, but rather the agencies that have been authorized by legislation to implement ethics laws. Naturally, structures vary from state to state. Nearly always several agencies share overall jurisdiction. Often, campaigns and elections are the responsibility of an election law enforcement commission as in Connecticut and New Jersey, while lobbying, personal financial disclosure, and other ethics areas are the responsibility of another commission or, more likely, of committees within the legislature itself. Occasionally, one commission has jurisdiction over all domains as does the extremely powerful California Fair Political Practices Commission, established by the Political Reform Act of 1974. In a number of states, including New Hampshire and North Dakota, the secretary of state's office has principal authority over ethics. Whatever other agencies operate, in many legislatures senate and house ethics committees or joint ethics committees also play a role.

The question that is of interest to the Joint Committee on the Organization of Congress concerns the relative merits of outside ethics commissions on the one hand and

inside ethics committees on the other. In my discussion of practice in the states, I shall present the advantages and disadvantages of both mechanisms. Nevertheless, I have a preference--albeit a grudging one--for the independent commission. I did not always feel this way.

In 1990 I was appointed by the Speaker of the New Jersey Assembly and the President of the New Jersey Senate to chair a commission on legislative ethics and campaign finance. The commission was created because Democratic Assembly leaders were then under fire for allegedly shaking down a lobbyist for the trial lawyers to finance their party's 1989 legislative campaigns. The commission, which included four legislator members and five public members, made recommendations in a number of areas. We never seriously considered the establishment of an independent ethics commission, but did recommend that the Joint Legislative Committee on Ethical Standards be enlarged to include a few public members in addition to the legislators who were serving. That recommendation was the first of several Commission recommendations that was enacted into law by the legislature[4].

Since that time, I have explored further the subject of legislative ethics (and have had my ethical consciousness raised--if not elevated--by participation in Harvard's Program in Ethics and the Professions, which is run by Dennis Thompson). Recently, I have consulted with legislatures in California, Connecticut, Kentucky, and Washington on the subject and revised my views on the viability of inside committees doing the job, even if they include public members.

Some such committees have played a useful role. Washington's House Board of Legislative Ethics, composed of legislator and citizen members, mainly has informed legislators and staff on whether they might be headed down a dangerous path by interpreting the House code of ethics. Legislators turn to the board for advisory opinions in order to get guidance or to protect themselves. However, much of the regulatory activity in Washington is handled by the state's Public Disclosure Commission. California's Senate Ethics Committee, a recent offshoot of the Rules Committee, is another example of a worthwhile mechanism. But the heavy lifting in California is done by the Fair Political Practices Commission.

As the principal ethics overseer, legislative committees have one significant advantage. Members ~~can~~ understand the legislative institution and the process, and thus should be able to make good judgments on cases and on policies. But this advantage is outweighed by severe ~~service~~ disabilities in the mechanism. First, members are reluctant to serve on such bodies and have little incentive to pursue any type of ethics agenda. In Kentucky for instance, the Legislative Board of Ethics had been in existence for over twenty years. The current chairman reported that when he took over, it had been over a year since the board had met. Second, members who are pressed into service naturally are reluctant to punish colleagues with whom they have empathy and whose support they undoubtedly will need on one matter or another. The member who chairs such a committee is in a particularly unenviable position. Third, in states with highly partisan legislatures, such division may also be reflected in decisions of an inside committee. New Jersey's joint committee, with its citizen members, had to confront the case of one of the

Democratic leaders of the Assembly. The decision of the committee followed partisan lines, but with one Republican voting with the Democrats to close the investigation of the Democratic leader. Fourth, whatever the job they do, committees on which sitting legislators serve have little credibility with the press, and probably little with the public as well.

For members, it is a no-win situation. Their colleagues are likely to accuse them of succumbing to pressures from the press and the press is likely to accuse them of being too clubby and trying to protect their colleagues. Even if such committees perform well, they will not be perceived to be doing so. Moreover, there is a real question as to whether any inside committees that have major responsibilities manage to do the job. What evidence there is appears to support the notion that legislators, not unlike members of other professions, cannot satisfactorily regulate their own ethical behavior.

The alternative to self-regulation, that of regulation by an independent commission, is not without problems. Such problems should not be discounted, but it is possible for legislators to live with them. The prospect in the states is for more such commissions, especially as the body of ethics law grows. The larger the amount of law, the more there is for an agency to administer and the greater the need for an agency separate from the legislature. More law would seem to be in the offing in the years ahead.

Less than two weeks ago, the Kentucky General Assembly concluded a special session on ethics, called in response to an F.B.I. sting and the indictments of current and former legislators, including the speaker. The legislature passed an omnibus ethics bill,

which contained restrictions on gifts, a prohibition on honoraria, limitations on PAC contributions, additional financial disclosure requirements, and the establishment of an ethics commission. There was little doubt during the session that the legislature would no longer leave ethics up to an inside body, but rather would go the independent route. The new Kentucky commission is empowered to investigate any violation upon complaint or on its own, and it may reprimand a violator or refer the case to appropriate prosecutorial authorities. The commission will also be issuing advisory opinions to members and promulgating administrative regulations to implement the ethics code. It will be monitoring filings, overseeing lobbyist reports, and establishing reporting procedures. It may also conduct public education programs.

Currently, there are relatively few independent commissions that have jurisdiction over the legislative branch. So, my comments regarding the structure and operations of independent commissions are based on a limited number of cases, specifically California, Connecticut, and Kentucky.

In providing for its ethics commission, the Kentucky Legislature tried to retain some control by means of the appointment of commissioners. The nine commissioners are all appointed by legislative leaders. The Speaker of the House and President of the Senate each name four members to the commission, including one former legislator and one current or former judge. The Speaker also appoints one member from a list of three names submitted by the State Auditor and one from a list of three submitted by the head of the Registry of Election Finance. The Senate President also appoints one member from a list of three submitted by the Attorney General and another from three

proposed by the head of the State Retirement Commission. The ninth commissioner is named by the Legislative Research Commission, a body composed of legislative leaders. Those named select a chairman from among them. In California, by contrast, the legislature does not possess appointment authority with regard to the five-member FPPC. The governor and other statewide elected officials name the commissioners, while the governor also names the chairman. The chairman's is the only salaried position, and this helps explain why the chairman is the prime mover of the FPPC in California.

Although the California Legislature has no control over the ethics commission, it does have some say over its budget, and may seek to exercise influence over commission behavior in that way. The initiative that created FPPC also earmarked a $1 million annual allotment and provided for a cost-of-living increase for the agency. Over the years, the legislature has added to that funding, while also assigning the commission new duties, so that currently the commission's budget is about $4 million. But the legislature has threatened, and continues to threaten, to cut the budget back to the basic funding level, as it has in cutting other state agencies. Kentucky's commission does not have the benefit of special funding, but only an appropriation of $50,000 for the rest of this fiscal year and $200,000 for 1993-94. There is certainly a question of whether that budget is sufficient and the larger issue of whether commissions that oversee legislative ethics (or campaign finance) are likely to be adequately funded by those whom they are regulating and, no doubt, antagonizing.

The case of California, which has had the FPPC for almost twenty years now, suggests that substantial ethics legislation and its administration by an independent

commission will lead to voluminous and complex regulation. Members are always seeking advisory opinions, informally by telephone or formally in writing. It is practically impossible for California legislators to travel officially without turning to legal counsel for advice. Examples of the types of questions that arise (taken from a memo by Senate counsel, Bob Leidigh, dated January 21, 1993) are indicted below:

(1) If I am asked to speak on public policy issues at a conference to be held in New Orleans by a trade association, what restrictions apply with regard to my costs for air fare, lodging, meals, honorarium?

(2) If I am asked by the same trade association to speak on the same subject at a conference to be held at Incline Village at the North Shore of Lake Tahoe, and I will drive there, are the rules different?

(3) What if the conference is to be held on the California side at South Shore of Lake Tahoe?

(4) If I am asked to go on a fact-finding tour of a recycling co-generation plant in Michigan by a private company which operates such plants, what restrictions apply with regard to my costs for air fare, lodging, and meals?

(5) If I am invited on the same trip by the University of Michigan, or the Environmental Protection Agency, are the rules different?

(6) What if the co-generation plant is in Germany and I am invited by the private company? What if I am invited by an agency of the German Government? What if I am invited by the Sierra Club's Legal Defense and Education Fund?

(7) If I am invited to attend an informational conference on AIDS held in San Francisco, what restrictions apply with regard to my costs for travel, lodging, meals, admission to the conference (assuming it is not free) if the conference is sponsored by a pharmaceutical company of by a trade association of the insurance industry?

(8) If the same conference is sponsored instead by the University of California Medical School, are the rules different?

(9) If I am invited to participate in a roundtable seminar discussing issues of allocation of scarce resources during these tight budget years to be sponsored by the League of California Cities in Los Angeles, what restrictions apply with regard to my costs for travel, lodging, meals and admission to the seminar?

(10) If the same seminar was sponsored by the University of Southern California, would the rules be different? What if it is the University of California?

(11) Do the rules change for any of the previous two situations if my role is to serve as moderator for a panel of distinguished policy experts, rather than as a panel member?

It is unpleasant for California legislators to have to operate in this regulated environment. (It is even more unpleasant for them to have to go on with their business in the midst of a federal investigation into legislative corruption that has gone on for almost five years.) They feel that they are being nit-picked to death by the commission, and it is easy for them to point to mindless regulations. But law begets regulation and regulation begets additional regulation. And whenever a legislator seeks an opinion or ruling from FPPC, he or she may be adding to the regulatory load.

Legislators cannot reasonably expect comfort from an independent ethics commission, and certainly not the same understanding and sympathy they receive from their colleagues on a senate or house committee. The relationship between FPPC and the legislature in California has been an adversarial one, although one of the commission's chairmen briefly tried to extend an olive branch. Soon after, however, he began to use his commission position in his campaign for the office of secretary of state, and the chasm widened again.

The organizational culture of FPPC is dominated by a law enforcement orientation, and one that is highly suspicious of politicians. We are here, commissioners and staff believe, to keep legislators honest. Such an agency probably cannot be protective. If it did so, it would lose its momentum, its raison d'etre, and its credibility

with press and public. If the relationship cannot be an amicable one, all that the legislature can reasonably ask is that the commission be fair. In both California and Connecticut, ethics commissions have been strong and fair. On balance, they also appear to have worked.

Legislatures have changed dramatically in the past twenty-five years. Until about 1980, state legislatures were developing as institutions, becoming more full-time and professional. Recently, however, the institutional shape and life of legislatures has taken a different turn. The boundaries between the legislature and its environment are less distinct than they used to be. Today's legislatures are more open and permeable. Collegiality is much diminishing; leadership is more precarious. The media are persistent, judgmental, and influential. Through their membership in interest groups and voting on initiatives and referenda, citizens are much involved in policymaking. The salience of ethics in American political life is still another manifestation of the change taking place.

"REFORMING CONGRESSIONAL ETHICS DISCIPLINARY PROCEDURES"

TESTIMONY BEFORE

JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS

FEBRUARY 25, 1993

WASHINGTON, D. C.

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"REFORMING CONGRESSIONAL ETHICS DISCIPLINARY PROCEEDINGS"

CHAIRMAN BOREN, CHAIRMAN HAMILTON:

It is my pleasure to return to Washington after having spent a decade of my life here. I look back with great fondness on my service on the staffs of four Senate committees: Judiciary; Ethics; Armed Services; and Iran-Contra. I trust I made some contribution to the work of those committees, however small it may have been.

If I might be permitted a personal note, it was my pleasure to have worked with and observed Senator Boren of the Senate Committee, and Chairman Hamilton of the House Committee, during that memorable summer in 1987 when the nation focused on the sordid affair we came to know as Iran-Contra. My respect for both of you gentlemen was heightened by that experience, and so it comes as no surprise that you have taken on the thankless task of attempting to make fundamental changes in the way this branch of government does business. The work of this Committee is important, and I am

pleased to have been given the opportunity to participate and, hopefully, contribute.

I cannot claim to be an expert on matters of legislative ethics generally or Congressional disciplinary proceedings in particular. But these are issues with which I dealt for three and a half years as counsel to the Senate Select Committee on Ethics, during which, among other matters, we conducted investigations of former Senators Howard Cannon and Harrison Williams. I served former Chairman Heflin as his principal staff assistant during hearings pursuant to S. Res. 109, sponsored by former Senator Lowell Weicker, to revise the Senate's Code of Official Conduct. During hearings pursuant to S. Res. 109, we did focus to a limited degree on procedural questions which attend Congressional disciplinary self-enforcement. And, generally, these are matters about which I have thought, written, and lectured to some extent in the ensuing decade. So I offer these thoughts with this background and perspective.

For a bit of context, let me offer two introductory observations:

I. **WE FIND OURSELVES IN A NEW ERA, IN WHICH PUBLIC OFFICIALS ARE LOSING THE OPPORTUNITY FOR PUBLIC ATONEMENT.**

Public officials, both elected and appointed, at all levels of government find themselves in a new era in which there is little or no opportunity after a scandal breaks or its appearance is hinted at for public atonement. It is an era which Stephen Hess of The Brookings Institution has called Washington's "Grand Ethical Revival." We increasingly are in a period when "ethics" seems more and more about being perfect.

There was a time not so long ago when public officials could stumble, could stub their toe, could make a mistake, and they were deemed to be "only human." As every freshman law student learns in torts, "every dog gets one free bite." More and more, I am inclined to believe that political dogs get no free bites.

Members of this institution are under a microscope with little or no time for atonement, redemption, or forgiveness.

Public life often only permits one slip-up. Sometimes, none. Just ask Zoë Baird. In this new environment we do not always recognize the important distinction between stupidity and venality, between bad judgment and bad people.

As Robin Toner of The New York Times put it:

> Politicians are desperately trying to figure out what conduct is acceptable in this new climate and what is not; at times, in their view, the only certainty is that the standards have changed.

"New Fallout Over Ethics," New York Times, May 27, 1989, p. 8.

I am not sure of all the reasons which account for this recent development. For what it's worth, I would posit several:

1. Increased media scrutiny.

   - Post "Watergate" mind-set, reinforced by Iran-Contra.
   - Domestic counterpart to "Global Village" phenomenon.

- o Increased media outlets.

- o Development and refinement of an "ethics" specialty press. Examples: Brooks Jackson, Wall Street Journal (now, CNN); Chuck Babcock, Washington Post.

2. Increasingly more combative, negative, investigative political campaigns, more opposition research.

3. Injection of partisan politics into the Congressional ethics disciplinary process.

4. The "personalization" of public figures.

5. Social and cultural changes manifested in problems regarding spouses and two-career families.

6. Use of financial disclosure and ethics forms/report compliance as a technical hook (not unlike tax evasion for gangsters).

7. Institutionalized scrutiny by "policing units": Special prosecutors, independent counsels, ethics committees, investigative reporters, disclosure laws and rules.

As Suzanne Garment, a Resident Scholar at the American Enterprise Institute has put it:

> We have vastly increased our capacity to detect misbehavior, to publicize it, and to enforce increasingly tough sanctions against it.

To Ms. Garment's listing, I would also add we seem to have vastly increased our *willingness* to detect, publicize, and seek sanctions against misbehavior.

The result when these forces combine and interact is the creation of an upward spiral: As we expose more of what appears to be misconduct, the public becomes more cynical, raises its own expectations about propriety and principled service, which leads to more disappointment and cynicism when public officials fall short of the increasingly higher standards.

II. **GOALS OF ANY SYSTEM OF ETHICS REGULATION.**

Our purpose today is not to discuss codes of conduct, their content, or their efficacy. As we discuss Congressional

ethics disciplinary procedures, however, it is important to keep in mind that whatever improvements are considered by this Joint Committee should fit within a broader framework. I respectfully submit that whatever changes you recommend should be measured against the following goals of any system of governmental ethics regulation:

1. Maintain high standards of ethical conduct -- so as to preserve independent judgment on matters of public policy and the public's business.

   This goal is offered in recognition that complex questions of public policy should be examined carefully and deliberately on their merits and should be decided free from forces which prevent or divert from decisions on the merits. This notion draws on what Professor Dennis Thompson has called the "duty of legislative autonomy." Ethical policy makers and ethical policy making, however, are not guarantors of wise policy making and sound policy, though logic suggests there is a greater likelihood of wise policy making and sound policy if the policy makers are free from forces

which divert them from deciding issues on their merits.

2. Maintain and enhance public confidence in government.

--In Government Officials — separate and distinct from purity of decisions made

--In the Governmental Process

3. Not interfere with, perhaps even further, the effective functioning of government.

4. Preserve the integrity of the process.

5. Treat all parties fairly, protecting individual reputations from undue criticism.

6. Promote the principles of openness in government (the ethics regulatory system should not be inconsistent with the public right to know).

7. Insure better public policy, better decisions (on the theory that independent and autonomous judgment, exercised free from corrupting influences, results in qualitatively better decisions).

8. Purge the system of corrupt officials (on the theory that those who profit from government service may well do so at the expense of the public, and of recipients of government services). Corruption robs the people.

9. Promote greater governmental accountability.

Parenthetically, it should be noted that there is some tension between and among these competing goals. For example, numbers 5 and 6. There may be a trade off between the extent to which we can protect individual reputations while serving the principle of openness in government. It may not be possible to maximize all nine of these goals within a single ethics regulatory scheme.

III. REFORM OF CONGRESSIONAL DISCIPLINARY PROCEEDINGS.

My testimony on this topic is a work in evolution. I am somewhat ambivalent about the notion of "contracting out" part of the Congressional disciplinary enforcement function. On balance, however, I believe that may be a step in the right direction. For sure, I believe that the Congressional disciplinary process should

be bifurcated so that a single group or panel is not charged with performing all three of the investigative, prosecutorial, and adjudicatory functions. Permit me to elaborate on both of these notions, in reverse order.

A. The Congressional Disciplinary Process Should be Bifurcated.

The issue of procedural due process in Congressional disciplinary proceedings has been insufficiently examined. It is possible that the courts may delineate the requisites of due process in legislative disciplinary proceedings; given past pronouncements, however, it is unlikely that they would cast aside what they have asserted are constitutional obstacles to such a ruling.[1] Not-

[1] The reluctance of the courts to interfere with, or define the procedural safeguards necessary for, Congressional disciplinary proceedings is grounded largely in the separation of powers doctrine. See, e.g., Williams v. Bush, 81-2839 (Dist. Ct., D.C., 1981). In Williams, former New Jersey Senator Harrison A. Williams, Jr., brought suit in federal district court to enjoin the Senate from debating the resolution recommending his expulsion from the Senate for ABSCAM-related violations of federal criminal law and Senate rules until such time as the court specified, among other things, the due process rights to which he was entitled. Judge Gerhard A. Gesell, in an oral ruling denying Williams' motion for a temporary restraining order (Hearing on Motion for Temporary Restraining Order, November 27, 1981, Transcript, at 26-28), and Judge Louis F. Oberdorfer, in an unreported written opinion dismissing Williams' suit (Unreported Memorandum Opinion, February 3, 1982, at 2-3), both cited separation of powers reasons for refusing to delineate Williams' procedural due process rights.

withstanding the unwillingness of the courts to delineate Members' procedural due process rights, I believe there are important issues of fundamental fairness which must be considered.

In my view, to have a single group of Members -- regardless their number, regardless their party affiliation, regardless the facts of the matter under review -- serve as investigators, prosecutors, and judges violates elementary principles of fundamental fairness. As I learned in a law school evidence class long ago, "you can't unring a bell."

The law permits certain matters to be excluded by the court at trial -- by rulings made prior to trial -- because they are so highly prejudicial to the triers of fact that even a timely objection made at trial and favorably ruled upon, with a curing instruction to the jury, would not undo the effect on the triers of fact of their hearing the testimony. Similarly, it is too much to expect of Members, being human, for them to remove from consideration or disassociate from their deliberations those matters presented to them by staff or outside counsel during earlier

stages of the proceedings. For this reason, I strongly recommend, at least on an experimental basis, that both chambers resort to a bifurcated procedure in which a second panel, whether internal or external to the body, serve one or the other of the investigative, prosecutorial, and adjudicative functions inherent to Congressional disciplinary proceedings.

B. The Congress Should at Least Experiment With Congressional Disciplinary Panels Whose Membership Includes Non-Sitting Members of the Body.

We are all aware of recent criticism, often heated, of Congressional disciplinary proceedings. Rightly or wrongly, the Senate's so-called "Keating Five" investigation was viewed by many as a "whitewash." This is perhaps neither the forum nor the time to consider the fairness or accuracy of that charge. Suffice it to say, numerous Congressional disciplinary investigations in recent years have been criticized for their leniency, and, by some, for their inherent inability to be objective. Resort to some form of panel comprising individuals who are not presently members of the House or Senate to investigate or hear evidence of alleged miscon-

duct of Members and/or to recommend to the full House or Senate disciplinary sanctions against Members would certainly help avoid the allegation that the Congressional disciplinary process is inherently flawed. Such a procedure would give the appearance of greater objectivity and independence, help avoid the problem of the perceived "clubiness" of House and Senate investigations, and, one would hope, begin to restore public confidence in our institutions of government.

There are other advantages to some form of outside panel. Members would be freed -- at least in part -- of a thankless, distasteful, and burdensome task. Service on the House and Senate ethics committees is extraordinarily time consuming. One can argue that members of these committees engaged in protracted disciplinary proceedings are diverted from the markup of appropriations bills, budget deliberations, hearings on important matters of public policy, meetings with constituents, and the like. My own experience certainly suggests this is true.

Resort to an outside panel, however, is not without its problems. We must be careful that in the effort to solve one appearance problem we do not create another, that is, that the Members are somehow avoiding part or all of their Constitutional responsibility to judge their peers and police their own body. It is for this reason that I recommend that outside panel members only be used for part of a bifurcated process, and that the outside panel not be comprised *exclusively* of former Members.

I strongly believe, however, that former Members should play some role on such a panel. Investigators, prosecutors, and triers of fact need some understanding of and identification with the environment within which Members operate. Legislators necessarily must fulfill a variety of roles and meet a number of obligations in the discharge of their official duties. These roles and obligations can, and often do, conflict. Their priority will vary among Members and, from time to time, with regard to an individual member. There is no "right answer" as to which role a Member should fulfill at a given time, and it must continue to be a

matter of individual determination. I feel strongly about this. Please permit me to elaborate.

At any particular time, a Member of Congress owes an obligation, in no particular order, to the constituents in his district or state; the voters who elected him; his party; his colleagues at large; his colleagues on committees, caucuses, task forces, or issues consortia; his president and vice president; his branch of government; his state; his country; his staff; his spouse and family; and himself (his conscience, his health, his political well-being). Needless to say, it is not always possible for a Member to serve all these interests, to fulfill all these obligations, at once. There will be times when to serve one's president is to deny one's party; to serve one's conscience is to deny one's constituents; to serve one's constituents is to deny one's colleagues. This is neither unnatural, unhealthy, nor unethical. It is arguable, however, that Members and the media do a poor job of explaining these multiple obligations; that they can, and do, conflict,

and that when they do conflict, it can occasion both difficult ethical dilemmas and painful decisions for Members.

The roles Senators and Congressmen play are as multiple and potentially conflicting as the obligations they must fulfill. A legislator is both a representative (ombudsman, mail answerer, case worker) and one who legislates (drafting, amending, voting on legislation). Members can apprise us of problems by holding hearings or speaking beyond the borders of their district or state to raise national consciousness. They can educate or exercise oversight. They can be specialists or generalists. They can sponsor and promote good legislation, or devote their attention to procedural and parliamentary maneuvers to kill bad legislation. They can advance the legislative agenda of the president or be a constant thorn in his side. It is not possible to fulfill all of these roles, but neither is there consensus -- nor should there necessarily be -- on which is "proper" or more important than all others.

There is a place in each of your chambers for a "Mr. or Ms. Institution," just as there is for the maverick who constantly challenges, questions, obstructs, or opposes. It is legitimate for a Member to address beyond his or her own constituency vital questions of public policy, even if to deliver a particular speech necessitates missing a few roll call votes. There is nothing improper, that is, nothing constituting a neglect of official duties, for a Member to fail to attend a hearing or meet with constituents if he or she is on the floor attempting to successfully amend a bill (or, for that matter, in a hearing on how to reorganize the Congress). And although voting is arguably the ultimate legislative act, there is nothing improper about a legislator missing a vote if he or she were in the district or state attending to a matter of grave concern to constituents. For that matter, we must remember that Members are political animals; they must, of necessity, run for reelection regularly. It takes money to run for reelection. And thus it is not inconceivable that Members could miss votes while attending fundraisers.

Likewise, it is not inconceivable that those contributing funds to the reelection campaigns of Members might also fit into the category of constituents needing constituent services. We saw that play out vividly during the Keating Five investigation.

What roles legislators choose to play, and what obligations they choose to fulfill, at any given time, are matters for their individual judgment. That judgment will be effected, as it should be, by a variety of factors ranging from, but by no means limited to, political philosophy, conscience, campaign promises, experience, longevity, policy needs and priorities, party discipline, media scrutiny, and constituent mail. Having said this, however, it is true that the willful and knowing neglect of duties and obligations by a legislator when there is no corresponding or conflicting one being served constitutes improper conduct. Obviously motive, though an inherently subjective matter to assess, must be taken into account. It is one thing to miss an important roll call vote because a Member happened to be chairing a field hearing in his district on unemployment if it is at a record level; it is

quite another for that Member to miss a scheduled crucial vote on a controversial issue such as abortion, gun control, or gays in the military under the guise of chairing a field hearing which is contrived to address a problem which for his or her district is relatively unimportant or even nonexistent.

While the multiple and conflicting roles and obligations of a legislator dictate a variety of legitimate, even creative uses of the legislative process, one can argue that the use of that process to serve exclusively or primarily personal or partisan objectives constitutes an abuse of office which, given its corrosive and pernicious effect on the public trust of our institutions of government, cannot be sanctioned. My point in this analysis, however, is that those individuals charged with the responsibility of judging Members' conduct very much need to understand the environment and competing obligations which I have just described. For this reason, any external panel should include at least some former Members. I believe a system can be devised which permits us to capture the good from this arrangement -- former Members who under-

stand the environment -- while at the same time avoiding the appearance of clubiness and coziness one gets when only current Members are involved in the disciplinary process.

Including both former and sitting Member involvement in some phases of the disciplinary process prevents the charge that the latter are shirking their responsibility, yet provides the element of independence to the proceedings while making it less burdensome on sitting Members. This hybrid solution may combine the best of both worlds.

There is, however, one matter of which the Committee should take note. I know from my own experience with the Senate Select Committee on Ethics that it was empowered by resolution of the Senate to investigate leaks of classified material from the Select Committee on Intelligence and the Foreign Relations Committee. My recollection is that in recent years one or more such investigations have taken place. If allegations of leaks are to be investigated under a new scheme which includes non-Member panelists, they will need to be properly cleared. That is not an insur-

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mountable obstacle, but simply one of which the Committee should be aware prospectively so that an investigation is not delayed while non-Member panelists wait to receive their security clearances.

Finally, the Committee should be aware of one potential downside to resort to outside panelists: The potential exists to exacerbate the procedural due process "notice" problem regarding disciplinary enforcement of ambiguous or unwritten standards. The balance between specificity and generality in legislative codes of conduct bears relationship to questions of procedural due process. In the drafting process, thought is given to making standards of conduct general enough to approximate the desired higher standard without being vague and thereby presenting Members faced with allegations of misconduct with a procedural process notice problem. Imposing sanctions for the violation of general, aspirational norms raises what Senator Howell Heflin has called the "question of vagueness and uncertainty and the issue of the rule of law."[2]

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[2] U.S. Congress, Senate Select Committee on Ethics, Hearings, Revising the Senate Code of Official Conduct Pursuant to Senate Resolution 109, 97th Cong., 2nd Sess. (Washington, D. C.: Government Printing Office, 1981), p.2.

It is axiomatic that ethical determinations involve line-drawing, often in gray areas. In a politically-charged climate in which incumbent legislators are scrutinized with frequency and intensity by challengers, the media, and, to a greater extent, by fellow Members of the opposing party, the least we can do is prospectively give them the benefit of our collective wisdom as to the specific conduct we expect of them.

To provide Members no more guidance than the admonition to do no wrong and reflect no discredit could lead, on the one hand, to the disciplining of Members who admit to the commission of acts which they never conceived a given ethics committee using a particular *after the fact* standard would deem improper; on the other hand, it could breed timidity on the part of Members who, given such vague guidance, are afraid to do anything.

The desire for specificity should not be misinterpreted. A Member is not relieved of responsibility for the propriety of his conduct by requiring that allegations of misconduct be measured against precise standards. Members must still make indi-

vidual judgments. What we must guard against is that we do not leave them hanging; that is, that we fail to tell them, as specifically as possible, what behavior is expected of them other than "do not reflect discredit on the institution," but afterwards inform them that in a particular area of grayness they made the wrong decision, for which they are to be disciplined. We saw this issue raised during the Keating Five investigation, and while there are no perfect answers to the problem, it is one of which the Committee should be aware and to which the Committee's recommendations should be sensitive.

Even in a Congressional disciplinary proceeding, allegations of misconduct must meet some minimal requirements as to form. They are presented by someone, as is evidence, which must meet tests of admissibility. The allegations are evaluated by someone, against certain standards. Burdens of proof must be met and presumptions overcome. Standards of fairness and impartiality must be observed. Although not a criminal proceeding, a Congressional disciplinary proceeding is, at a minimum, quasi-judicial.

Surely the procedural due process rights of notice, the opportunity to be heard, and to confront and examine witnesses should be afforded the accused.[3]

Disciplinary proceedings also have within them the potential to be charged with emotion. Given the low esteem in which Members are held by some members of the public, the tendency of allegations to have greater attendant publicity than subsequent findings of exoneration, and the tendency of misconduct charges -- once made -- to haunt public officials throughout their careers, however unfounded such charges may prove to be, it is arguable that highly visible public officials should at least be afforded the most fundamental elements of procedural due process.

A case can be made for such a view, especially given what some observers see as an American public, informed by cynical media, which believes all office holders to be "on the take." Such

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[3] For a discussion of what procedural safeguards should be afforded the accused in a Congressional disciplinary proceeding, see the discussion between Senator Howell Heflin and Victor H. Kramer, U. S. Congress, Senate Select Committee on Ethics, Revising the Senate Code, at 72-73.

a public would believe that all against whom charges are brought are guilty and, upon the criminal conviction or legislative disciplining of a Member, that their suspicions about all Members of Congress have been confirmed. Perhaps there are Members who would hide behind the shield of procedural due process. If such protections are deemed worthy for the innocent, however, it is inconsistent with our historic concept of fairness to argue that it would be unethical for them to be used by the guilty.

There are no easy answers to these questions, but the matter is an important one, for the question of the standards against which conduct is to be judged and the procedural due process needs of those against whom charges are made will both be affected by the decisions and recommendations of this Committee to reform the Congressional disciplinary process.

Whether this Committee can accomplish what it's charter charges it with and whether the Congress, through its disciplinary process, can achieve the goals set out herein are unknown. But as John W. Gardner reminds us, "the capacity of humans

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Joint Committee on the Organization of Congress

Hearings on Reform of Congressional Disciplinary Procedures
February 25, 1993

Thank you, Messrs. Chairmen, and your colleagues, for inviting me to comment on some of the issues you face as you consider possible changes in the procedures for enforcing standards of ethics for members of Congress. I come before you, as you no doubt appreciate, not as an expert on the procedures or standards themselves. I am here to offer some thoughts from the perspective of a political theorist who studies the ethics of various public professions, including the honorable profession of politics.

I first testified on Congressional ethics in 1980. Although I had previously proposed an outside body to investigate ethics charges and make recommendations to the Senate, the idea had such little political support that no member evidently thought it worth discussing.[1] I am pleased that what seemed heretical then has now become respectable enough to warrant discussion. Members in both houses have introduced resolutions -- at last count, five -- which would establish some kind of relatively independent body to supplement or replace the disciplinary procedures now in place.[2] I am still inclined to favor this approach, and therefore also the general thrust of the proposals made in most of these resolutions. I am not in a position, however, to defend any of the specific proposals or to present a specific alternative myself. I shall try only to discuss some of the principles and considerations that, in my view, point in the direction of establishing some kind of outside body to assist in the disciplinary process.

"No one should be the judge in his own cause."[3] This maxim, which has guided judges of cases and makers of constitutions since ancient times, expresses fundamental values of due process and limited government. It grounds many basic provisions in our own Constitution, such as the separation of powers, judicial review, and federalism. It is the principle that the authors of the *Federalist Papers* invoke at critical junctures in their argument for the constitution.[4] Both Madison and Hamilton, furthermore, apply the principle not primarily to individuals but to institutions (the states, the federal government as a whole, and Congress). As Madison writes: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, *a body of men* are unfit to be both judges and parties at the same time ..."[5]

The rationale for the principle that one should not judge in one's own cause is twofold. First, the principle is intended to help prevent biased judgments by eliminating some of the most common conflicts of interest, namely those that arise when the interests of the judge and the judged overlap. The judgment in such circumstances is likely to be biased in favor of the accused, but it may also sometimes go in the other direction, when a judge overcompensates for the first kind of bias. In either case, the judgment is not made strictly on the merits of the case

The second reason for the principle is less well appreciated. The principle is intended to help promote the confidence of citizens in the process of judgment. This is one of the general purposes of ethics standards in government in the first place, and it is therefore especially important that the process by which the standards are enforced appears credible to citizens. Let me say something more about each of these rationales for the principle.

The first rationale assumes that it makes sense to say that the legislature is judging in its own cause when it disciplines members. In what sense is the Senate or the House a party to the cause when it judges the case of an individual member charged with an ethics violation? Although the Senate or the House is not literally on trial in any particular case, their interest is closely connected to the fate of the individual member. It is not plausible to treat the interests of the judges and the judged as separate, as in a judicial trial or even in disciplinary hearings such as those conducted in some other professions. At least three different factors tend to blur the distinction between judge and party in legislative institutions.

First, more than in most other professions or most other institutions (even in the other branches of government), members of Congress depend on one another to do their job. They have worked together in the past, and they must work together in the future. The obligations, loyalties and civilities that are necessary, even admirable, in this kind of process obviously make it difficult to judge one's colleagues objectively, or at least to act on the judgments, if objectively made.

Second, part of what is at issue in a particular case is often the question of whether or to what extent the individual member's conduct departs from the norms of the institution. In these circumstances, the conduct of the members who are judging can become an issue, as the accused member claims that what he is doing is no different from what other members have done. This was a familiar plea in the case of the so-called "Keating Five," and though in my judgment it was not valid, it did put other members, including members of the Ethics Committee, in the awkward position of defending themselves, trying to show how their conduct differed from that of some of the accused.

The third way in which the positions of the judges and the judged converge in cases of legislative ethics concerns the public reaction. Members who are judging know that they themselves will be judged by the public. The political pressures that build during the disposition of ethics cases are potent – often more potent than judicious. The problem is usually not that members cave into this pressure; it is more likely just the opposite. Under pressure, members are inclined to come to their colleague's defense, to give him the benefit of the doubt, especially in face of the exaggerated claims that inevitably appear in the press.

Because of the political nature of the institution, then, it is difficult – indeed, not even wholly desirable – for members to act purely as judges, focussing on only the merits of the particular charges in a case. Legislators have legitimate obligations – obligations that judges do not have – to take seriously the reactions of their constituents, and the effects of their decisions on the welfare of the institution of Congress as a whole.

For all these reasons, when a legislative body investigates, charges, and disciplines a member, it is not fully observing the principle that one should not be a judge in one's

own cause. It is to this extent less likely to reach an objective judgment on the merits. But further: even if it does, citizens may doubt that the judgment is objective, and may have good grounds for their doubts. This is the second rationale for the principle: it seeks to promote public confidence in the process.
There is a tendency to dismiss this point by treating it as simply a problem of perception, a matter of mere appearances. If only the public were properly informed, they would see that the process is tough and fair, that members are doing their duty impartially. It is of course true that public perceptions are often distorted, based on incomplete or false information, further exaggerated by the press. But given the circumstances of potential conflicts of interest I described earlier, citizens have reasonable grounds to worry that the process may be biased, even if those close to it believe that it is not. Because the conditions for biased judgment really exist, citizens are warranted in treating the appearance of biased judgment as reality. Citizens often have no way of finding out what the reality is, and therefore good reason to assume the worst.

In our personal life – in relations among family, friends and colleagues – we are not morally obliged to take appearances so seriously. The reason is that usually we can more easily get at the reality behind the appearance. But in the more impersonal world of politics, reality and appearance blend together. Public officials, therefore, have an ethical obligation to do all they can to make sure that citizens do not have any reasonable basis for believing that the institution does not take its ethics rules seriously. It is an ethical failure when a member or a committee or a whole chamber fails to take into account the reasonable reactions of citizens.[6] This is true in general but is even more important when the fairness and impartiality of the process is at stake. Appearances matter ethically, not just politically.

These two rationales for the principle that one should not judge in one's own cause imply – in the absence of other considerations – that Congress should not be the sole judge of its own members. The important values of due process and constitutional government that the principle expresses could be better fulfilled if the process of enforcing the rules of ethics were assigned to another institution. But there are other considerations, which may call for qualifications to this conclusion. I want to consider three such considerations, which are often put as objections to proposals for external disciplinary proceedings.

The first objection points to other professions, which have traditionally favored self-regulation as the means of enforcing their own professional ethics. Doctors, lawyers, and the clergy, among others, also face problems of conflict of interest and abuse of power by their colleagues, but (it is claimed) manage successfully to adopt and enforce rules of ethics themselves. Even if this were true, it would not necessarily mean that legislators should be expected to have the same success. The circumstances of the legislative profession differ significantly from those of other professions: legislators do not control who joins their profession, and they depend even more than most other professionals on the cooperation of their colleagues.

The self-regulation or its success in the other professions turns out to be exaggerated, however. Many professions are more subject to outside independent control than is usually assumed, and those that do have more control over their own ethics enforcement have not been so successful as is sometimes claimed.

The legal profession is a prime example in the first category. The model rules and codes that govern lawyers' ethics are ultimately enforced by the courts. Lawyers, moreover, are increasingly subject to other kinds of sanctions, such as liability suits for breach of ethical duties, institutional controls (such as Rule 11), and administrative regulations affecting representation before certain agencies. Furthermore, some of the most thoughtful commentators on legal ethics are challenging the adequacy of the present system, calling for more outside controls, (though tailored to specific contexts).[7] Even accountants and business executives who used to roam more freely in the marketplace, now face many more controls on conduct that their peers or their consciences regulated. External agencies such as the SEC now set ethical standards and punish violations of them.

Although the practice of medicine is in some respects highly regulated by state agencies, certain areas of medical ethics – in particular conflict of interest and self-referral – have remained the responsibility of the profession itself. An important new study of these practices shows that the medical profession has not taken this responsibility seriously.[8] The AMA has only recently adopted, evidently under the threat of legislation, rules against self-referral; the rules remain vague, without any enforcement mechanisms, even though there is evidence of abuse in this area.

Another profession – research scientists – has also until recently insisted that it could take care of its own ethics. A study of 493 institutions found a remarkable lack of consensus on what if anything should be done to prevent and correct abuses in the process of medical research.[9] Many institutions still have no institution-wide procedures to deal with fraud, and no plans to establish any. In many of the institutions, the investigation of alleged fraud is conducted by the head of the lab and co-workers in that lab. Only 60 out of the 493 institutions said they would regularly notify the agencies supporting the research, or the journals which are publishing the research that is under investigation for fraud. In the face of instances of fraud even in prestigious institutions, the government, including Congressional committees, have been forced to investigate and enforce standards.

Two other professions that have traditionally insisted on regulating their own ethical conduct – academics and the clergy – are also coming under increasing scrutiny by outside authorities. Professors are now being required by state legislatures and other outside authorities to disclose sources of funding for their research, report their outside activities, and follow certain procedures in making appointments to the faculty. The enforcement of ethical standards among the clergy is probably the most various, perhaps further evidence that God works in mysterious ways: the processes range from completely laissez-faire systems in some Protestant denominations to the relatively rigid controls in the Catholic Church. But recent revelations of sexual misconduct in the priesthood have cast doubt on the efficacy of even the latter.

The profession that has most successfully resisted outside regulation of its ethics is journalism. It typically wards off evil by waiving the First Amendment before its attackers. Compared to most other professions, it also has few institutional mechanisms for enforcing ethical standards. Whether the ethics of journalists is higher than that of other professions is a matter I leave to others to judge. But it would be ironic if, to defend their own claims for self-regulation, legislators were forced to invoke the press as their chief example of a successful self-regulating profession.

Those who favor self-regulation in Congressional ethics, then, should take little comfort in the record of other professions. Either the others are not as self-regulating as they appear, or they are not as successful as they claim. The most successful may be certain parts of the legal profession, which have mixed systems of internal and external controls.

The second objection to proposals for an outside body stresses the *differences* between legislators and other professionals – in particular, the fact that legislators are accountable to voters. Legislators practice their profession very much in public, and they risk, every two or six years, losing their license to practice. Congress, it is therefore claimed, should require only disclosure, and then let the voters decide whether a member has been ethical or not. So rather than self-regulation, Congress already has, it might be said, a system that is the ultimate in external enforcement.

The trouble with this line of argument is that all citizens have a legitimate interest in the conduct of all members, even those for whom they cannot vote. To maintain the effectiveness and credibility of the Congress, constituents in *any* state or district may quite rightly instruct their representative to seek, through the procedures of the legislature, standards to govern the conduct of *all* representatives. Leaving enforcement only to the constituents of each member puts other members of Congress – and all citizens who care about the moral health and political efficacy of the institution – at the mercy of the moral and political judgment of a few members and their constituents. To avoid this danger, ethics enforcement must be a collective responsibility of the Congress.

The proponents of self-regulation may acknowledge this collective responsibility, but still insist that voters should decide, not whether their own representative is ethical, but whether their own representative is doing his or her part in fulfilling this collective responsibility. We might wish that voters would judge their representatives partly by their contribution to the health of Congress as a whole. But we know that most voters do not; this is one of the most consistent findings of modern political science. Unfortunately, a successful and common strategy is to "run for Congress by running against it."

The electoral connection, effective for legislative accountability and constituency service and other purposes, does not really provide the external form of enforcing ethical standards that we are seeking. If anything, it actually interferes (in ways I suggested earlier) with the fair and impartial internal enforcement proceedings. It actually provides another reason for some form of independent enforcement mechanism.

The third objection I want to consider also stresses that Congress is different, not because of its electoral connection but because of its constitutional responsibilities. The explicit grant of authority to determine rules and punish members (Article I, Section 5) strongly implies that Congress should keep control of the process of disciplining members for ethics violations. No other branch of government and no other profession is assigned constitutional authority of this kind, and any attempt to dilute that authority, it is argued, would be irresponsible, and perhaps unconstitutional.

This objection has some force, and ultimately provides the reason that I do not favor a completely independent agency or commission to enforce ethical standards in Congress. But we should be careful not to overstate the objection. In the first place, the clause in question does not literally prohibit the delegation of this authority. The clause says that Congress "may" determine rules and punish its members, not "shall" as in some other

clauses. Second, as far as I am aware, there is no authoritative court decision interpreting this clause in a way that would prevent Congress from establishing an outside body for ethics enforcement. One of the few cases bearing on the clause in fact points in the opposite direction, holding that a district court did not have jurisdiction over a claim by House members that they were denied a certain number of seats on several committees.[10] Finally, and most importantly, the logic of the proposals to establish an outside body is very much in the spirit of other principles inherent in the constitution and characteristic good government. As I suggested earlier, it is a constitutional principle that seeks to separate as far as possible the judges and parties to a cause.

Nevertheless, the objection remunds us that Congress must have the final authority for disciplining its members. This seems a reasonable inference from the Constitution, and more importantly from consideration of the alternatives. Other possible authorities—such as the courts, the executive, or the electorate—would be either inappropriate or ineffective.

Yet the fact that Congress must have final authority does not mean that it must have complete control of the process. Virtually all of the proposals under consideration leave to Congress both the power of appointing members to the outside body and the authority to make the final judgement in any particular case. The proposals differ chiefly in how much of the process prior to final judgment (investigation, hearing, formal charge) they would assign to the outside body. Within this range of alternatives, considerations of political prudence and administrative convenience may reasonably play a role in designing the proper procedure.

But considerations of principle, I have suggested, point toward granting some significant responsibility to a body whose members are not members of Congress. If this is the principled solution to the problem of ethics enforcement, then Congress is acting responsibly in choosing to adopt it. By instituting such a body, Congress would not be abdicating its responsibility, but fulfilling it. Congress would be demonstrating confidence in its members and in its own integrity by entrusting part of the process of enforcing its standards of ethics to citizens who could not in any way be considered to be judges in their own cause.

NOTES

1. "The Ethics of Representation," in *Revising the U.S. Senate Code of Ethics, Hasting Center Report*, Special Supplement (February 1981), pp. 13-14; and U.S. Senate, Select Committee on Ethics, *Revising the Senate Code of Official Conduct...*, Hearings, 96th Cong., 2d Sess., November, 1980), pp. 75ff.

2. H. Res. 43, 103d Cong. (and H.Res. 465, 102d Cong), S. Res. 190, 102d. Cong., S. Res. 221, 102d. Cong., S. Res. 327, 102d., H. Res 526, 100th Cong.

3. This is commonly attributed to Publilius Syrus (or Publius, as Pliny says in his *Natural History*). Also see the similar maxim by Pascal in *Pensées*, ch. 4: "It is not permitted to the most equitable of men to be a judge in his own cause.")

4 *The Federalist*, ed. B. F. Wright (Harvard University Press, 1961), No. 10, p. 131. Also see Hamilton, No. 80, pp 502-503

5. *Ibid.* (italics added)

6. The potential effect on the conduct of others is the principal reason that Thomist ethics has traditionally treated appearing to do wrong under certain conditions as a distinct wrong. The wrong is called "giving scandal," and is defined as providing the "occasion for another's fall." It is considered a sin if one's otherwise permissible action is of the kind that is in itself conducive to sin, and it remains sinful whether or not one intends it to have any effect on others (Aquinas, 1972, vol. 35, Question 43, "Scandal," 109-37).

7. David B. Wilkins, "Who Should Regulate Lawyers?" Harvard Law Review, 105 (February 1992), 801-87.

8. Marc Rodwin, *Medicine, Money, and Morals: Physicians' Conflicts of Interest* (Oxford University Press, 1993), chs. 2, 7.

9. Greene et al., "Policies for Responding to Allegations of Fraud in Research," *Minerva*, xxiii (Summer 1985).

10. Vander Jagt v. O'Neill, D.C.D.C.1981, 524 F. Supp. 519, affirmed 699 F.2d 1166, 226 U.S. App. D.C. 14, cert. den. 104 S.Ct. 91, 464 U.S. 823, 78 L.Ed.2d 98.

65-585 (128)

ISBN 0-16-040616-1